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REPORTS OF CASES

DETERMINED BY THE

SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

FROM FEBRUARY 15, 1906, TO APRIL 24, 1906.

BY

CLARKE W. MAY,

ATTORNEY GENERAL AND EX-OFFICIO REPORTER.

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REPORT OF DECISIONS

OF THE

SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

CHARLESTON

STATE *v.* CLIFFORD.

Submitted January 11, 1906. Decided February 13, 1906.

1. HOMICIDE—*Evidence—Threats.*

On the trial of an indictment for murder, evidence of threats, made by the deceased or his co-conspirator, previously communicated to the accused, is competent and proper for the purpose of shedding light upon the mental attitude of the prisoner toward the deceased at the time of the homicide, and of explaining the possession of the weapon with which the killing was effected, as tending to rebut any inference of malice which might be drawn from the fact of its possession on the occasion of its use. (p. 8.)

2. HOMICIDE—*Evidence—Threats—Conspiracy.*

When, in such case, there is evidence tending to establish a conspiracy on the part of the deceased, and other persons, to kill the accused, or do him grave bodily injury, and to show that the accused believed, and had reasonable ground to believe, that such conspiracy existed and the deceased was a party thereto, and the killing ensued, immediately after an unprovoked assault upon, and severe beating of, the accused, by such other persons, the deceased standing by at the time, and there being evidence tending to show that he joined in the assault, evidence of threats made by such other persons and communicated to the accused before the assault, is admissible. (p. 9.)

3. CRIMINAL LAW—*Instructions, Setting Forth Forms of Verdict.*

An instruction setting forth six forms of verdict, proper for findings on an indictment for murder, and telling the jury that, under

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f63 84
f63 476

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f64 635
f64 636
f64 637
f65 85

59 1
f66 385

the indictment, they can return any one of said verdicts, is defective in failing to direct the attention of the jury to the requirement that any verdict so returned must be based upon their belief from the evidence; but if it appears from other instructions given at the same time, that the attention of the jury was repeatedly directed to this requirement, the giving of such instruction is not error. (p. 15.)

4. CRIMINAL LAW—*Homicide—Instructions—Intent—Deliberation.*
It is not error to give, as an instruction to the jury in a criminal trial, the following legal proposition: "The court instructs the jury that to constitute a willful, deliberate and premeditated killing, constituting murder of the first degree, it is not necessary that an intention to kill should exist for any particular length of time prior to the actual killing; it is only necessary that said intention should come into *existance* for the first time at the time of such killing, or any time previous." (p. 16.)

5. CRIMINAL LAW—*Homicide—Instructions—Degrees of Offense.*
On the trial of an indictment for murder, it is not error to give instructions, presenting the theories of guilt of murder of the first and second degrees, and directing the attention of the jury to the presumption of guilt, arising from certain facts, in case the jury should believe them to be established by the evidence, if there is any evidence tending, in any appreciable degree, to prove such offense. (p. 17.)

6. HOMICIDE—*Instructions—Manslaughter.*
When the homicide, in respect to which the accused is on trial, immediately followed an unprovoked assault upon, and severe beating of, him, and the evidence tends to prove the offense of manslaughter, the court may properly give instructions based upon the theory of guilt of murder, if there is any evidence in the case tending to prove the commission of such crime. (p. 18.)

7. HOMICIDE—*Instructions—Defenses—Accidental Killing.*
The defense of accidental and unintentional killing does not preclude the giving of instructions embodying the law relating to any offense charged in the indictment which the evidence tends to prove. (p. 18.)

8. INSTRUCTIONS—*Construction of as a Whole.*
To determine whether the trial court has erred in the giving of instructions, all the instructions must be read together, and, if being so read and interpreted according to the plain common-sense meaning of the terms used, they state the law correctly as applied to the evidence, and it appears that the jury could not have been thereby mislead to the prejudice of the accused, the verdict will not be disturbed, because they disclose a mere technical conflict in terms. (p. 23.)

9. EVIDENCE—*Refusal of Court to Permit Witness to Answer—Appeal.*
Refusal of the court to permit a witness to answer a question

which, by its own terms and subject matter, taken in connection with facts and circumstances, already in evidence, shows its relevancy and materiality, is not available as error on a motion for a new trial, if the expected answer of the witness was not disclosed to the court at the time of the ruling. An appellate court, in reviewing a judgment on writ of error, cannot assume, in such case, that an answer favorable to the exceptor would have been given. So much of the decision in *Gunn* v. *Railroad Co.*, 36 W. Va. 165, as conflicts with this principle, is disapproved. (p. 11.)

10. HOMICIDE—*Manslaughter—Evidence—Killing in Heat of Blood.*
A sudden intentional killing with a deadly weapon, by one who is not in any way at fault, in immediate resentment of a gross provocation, is *prima facie* a killing in heat of blood, and, therefore, an offense of no higher degree than voluntary manslaughter. (p. 21.)

11. HOMICIDE—*Manslaughter—Evidence—Deliberation—Reversal.*
When in such case, the evidence discloses that no time intervened between the giving of the provocation and the act of killing, within which passion could have subsided and reason regained its dominion and the fatal act itself was not attended by circumstances of extreme cruelty and inhumanity, nor preceded by conduct from which malice can be inferred, a conviction of murder in the second degree should be set aside and a new trial allowed. (p. 21.)

12. CRIMINAL LAW—*Motion for New Trial—Insufficiency of Evidence.*
A motion for a new trial based on alleged insufficiency of evidence, is an appeal from the jury to the court on a question of law. (p. 23.)

13. CRIMINAL LAW—*Motion for New Trial—Insufficiency of Evidence—Functions of Court.*
In passing on such a motion, the court does not re-try the case on the evidence nor disturb any findings made by the jury on evidence sufficient in law to sustain them. It simply determines whether, in law, the facts found, or which could have been found, constitute the right in action, or the offense charged. (p. 23,)

14. HOMICIDE—*Malice—Question for Jury.*
In homicide cases, the question of malice is for the jury when there is sufficient evidence to sustain a finding of its existence. Whether there is any evidence of it is a question for the court in giving or refusing instructions. Whether there is sufficient evidence of it to sustain a verdict, is for the court on a motion for a new trial. (p. 27.)

15. HOMICIDE—*Accidental Killing.*
In cases where the blow intended for one person by accident falls upon and kills another, the thing done follows the nature of the thing intended to be done, and the guilt or innocence of the slayer depends upon the same considerations that would have governed had the blow killed the person against whom it was directed. Hence the homicide is murder, or manslaughter, or excusable homicide,

for precisely the same reasons that would have determined its character had the event conformed to the intent, and the principle is the same whether the misadventure proceeded from the misdirection of the blow or from a mistake in the identity of the victim. (p. 30.)

Error to Circuit Court, Berkeley County.

Paul Clifford was convicted of murder, and brings error.

Reversed.

FAULKNER, WALKER & WOODS, for plaintiff in error.

C. W. MAY, Attorney General, for the State.

POFFENBARGER, JUDGE:

Paul Clifford, under sentence, by the circuit court of Berkeley county, of imprisonment for the period of ten years, upon conviction of the murder of Jacob Turner, has brought his case here on a writ of error.

The deceased came to his death by a shot from a pistol in the hands of the accused, but the circumstances of the killing were peculiar and unusual in some respects. Clifford was set upon and beaten in the night time by Charles and Joseph Cook, by way of punishment for an alleged insult to Jennie Cook, the wife of Joseph Cook, in the afternoon of the same day. No provocation was given by Clifford at the time of the assault. Having been accosted by the Cooks and charged with the language imputed to him, he denied it and attempted in every way to avoid any trouble with them. At that time, Jennie Cook was absent and the conversation continued until she came up and charged Clifford with having used the language in question, and thereupon Charles Cook struck him with his fist, and Joseph joined in the assault. At the time of the blow thus given, Clifford was standing with a pitcher of milk in his left hand, while his right hand held the pistol in the pocket of his pantaloons. There is evidence tending to show that the Cooks were aware of his possession of the pistol at that time, but, if they were not, they immediately discovered it and attempted to wrest it from him. In the struggle which ensued over the possession of the pistol, and during which the beating of Clifford continued, the pistol was discharged and the ball injured one of the fingers of Charles Cook. Soon afterwards, a second discharge of it sent a ball through the thigh of Joseph Cook. While the struggle was

in progress, J. R. Clifford, father of the accused, came upon the scene with a repeating shot-gun and called upon his son's assailants to let go of him, threatening, in the event of their refusal, to shoot them. Thereupon, they broke away from him, Charles Cook being the last to do so, but, before doing so, he threw the accused backwards and then ran. Imemdiately after this, the pistol was discharged a third time and the ball struck Turner in the head, killing him instantly. Whether it was fired by design or accident, is a matter of controversy, as is also the exact position in which the accused was at the time of the shot. Another matter as to which there is contradictory evidence is whether Turner participated in the assault. Charles Cook testifies that his brother Joe, after having been shot, called upon Turner to assist in taking the revolver from the accused. The accused and one other witness testify that, after the second shot, Turner did join in the assault and continued to engage in it until the arrival of J. R. Clifford. J. R. Clifford testified that his son was engaged with three men when he came up, but he was unable, owning to the darkness, to recognize any of them. Turner was found dead at a point about ten feet distant from that at which the accused was released, and J. R. Clifford says he saw a man fall a short distance from his son and in that direction, at the time of the third shot. Charles Cook says he ran in that direction, upon leaving the accused, and, in this, he is corroborated by another witness. Several witnesses swear that the accused rose to his feet and fired the fatal shot after taking a step forward in the direction of Turner. One says he not only did this, but looked at the deceased for about a minute before he fired. The father of the accused says the shot was fired as the latter arose from the backward position in which he had been thrown by Cook. The accused says he is unable to tell whether the pistol was discharged as he was thrown backwards or as he was in the act of rising, and that he saw nobody and shot at nobody at the time and is unable to state whether he discharged it by accident or design. Two of the officers who took him into custody on the night of the shooting, testify to an admission by him to the effect that he shot Turner, in which he said, by way of justification, that the deceased was coming towards him with a razor in his hand.

To show justification for possession of the pistol by the accused at the time of the affray, as well as to excuse the killing, on the theory of a conspiracy on the part of the deceased and the Cooks, to kill the accused or do him great bodily harm, or, in case the jury should find the shooting to have been intentional, to mitigate the offense and reduce it to manslaughter, the facts relating to the transaction out of which the affray arose, and the conduct of Turner and the Cooks in the time intervening between that transaction and the affray, have been brought into the record. Sometime in the afternoon of April 6, 1905, the day of the killing, a dispute arose between two children, a brother of the accused and a son of the deceased, near the house in which the accused resided. This house and the one in which Joseph and Charles Cook resided stood almost opposite each other on West Martin street, in the city of Martinsburg. Jennie Cook, the wife of Joseph, was a niece of Jacob Turner. The accused separated these two children, and, in doing so, did or said something that offended Jennie Cook, in consequence of which there was verbal altercation between him and her. She claims he called her a vile name. He admits that, but says he was provoked to it by an opprobrious epithet applied to him by her; and, after he had done so, she informed him that she would tell her husband who would shoot him like a dog, and later repeated the threat in different form, in the presence of Dr. Gray and a sister of the accused, saying, "That's all right, you wait till Joe catches you, he'll fix you. He'll kill you, you dirty nigger." He says he was further warned by a little boy, Walter Johnson, who said, "Mr. Paul, Mr. Cook's going to shoot you." Charles Cook worked at a hotel in Martinsburg, where he was called for by Joe Cook at about five o'clock that evening. Just what passed between them, in the conversation there, he did not state. He first said he was busy and had no time to talk, but, later, admitted that he did talk to him and said, in response to a question as to whether he made an engagement, "I told him would be up home after a while." As soon as his work at the hotel was completed, he did go up to Joseph Cook's house, where he made his home, and where he found Jacob Turner and his brother Joe, standing near the front door. He either went in the house or started to go in, and very soon thereafter the

two Cook's and Turner started out the street in the direction of the place at which the shooting occurred. Turner did not live on that street, but on a fifteen foot alley, 198 feet south of said street back of the lot at the front of which he was killed on that street. The place of the killing was about four hundred and ten feet west of the house in which the Cooks resided. Charles Cook says Turner remarked as he started with them, "I am going over home," and that he and his brother were going out on the hill, in the same general direction. Whether Jennie Cook accompanied them all the way, is not clear, but, if not, she followed them at no great distance, for she appeared on the scene very soon after the quarreling began. Just before this procession started from the house of Joseph Cook, the accused had left his house and gone in the same direction to the house of one Smith which stood outside of the corporate limits, for a pitcher of milk, and, on the advice of his father, who knew of the threats, he took the pistol with him. He staid at the house of Smith only long enough to obtain the milk, and, on his return, when but a short distance from Smith's house, he was met by the two Cooks, and, according to his testimony, Jacob Turner. Thereupon the quarreling began as hereinbefore detailed and continued until they reached the point at which the assault was made. The distance from Cook's house to Smith's is six hundred and fifty feet. According to all the testimony, the assault was made in front of the house of William Brown, standing on the north side of the street, four hundred and seventy feet from Cook's house, and Turner's body was found at a point about four hundred and ten feet distant therefrom, on the south side of the street. The street, at that point, is about sixty feet wide.

The assignments of error are six in number, the first of which relates to instructions given at the instance of the State; the second, third, fourth and fifth, to the refusal of the court to permit a witness to answer certain questions; and the sixth, to the refusal of the court to set aside the verdict and grant a new trial.

In the interest of clearness, the second, third, fourth and fifth assignments of error will be disposed of first. In the course of the examination of J. R. Clifford, he was asked if he knew the occasion for Paul Clifford having a revolver on

his person that night; if he had heard any threats communicated to his son by Joseph and Charles Cook; if he had heard any threats communicated to his son that evening from Jennie Cook, the wife of Joseph Cook; and what, if anything, he knew of his own personal knowledge of any threats communicated to his son, made by Joseph and Charles Cook, or either of them, to do him great bodily harm. The court refused to permit the witness to answer any of these questions, but did allow the accused himself to testify to his knowledge of such threats, and then allowed witnesses to contradict him in respect thereto. This evidence was admissible. It is proper to prove communicated threats to shed light upon the mental attitude of the prisoner toward the deceased when the homicide occurred, and for the purpose of explaining the possession of the weapon and establishing justification for carrying it, and thus rebutting any inference of malice which might arise from the fact of its possession on the occasion of its use. *State* v. *Evans*, 33 W. Va. 417; *State* v. *Clark*, 51 W. Va. 457. By way of sustaining the action of the court in refusing to admit this evidence, it is urged that the threats did not emanate from Turner, but only from the Cooks. But as they constituted parts of the series of events which led up to the killing of Turner bearing materially upon the situation of the accused at the time, and are logically inseparable from that event, they could not properly be excluded. The deceased was the father of the child, concerning whom the difficulty arose. He, in company with Jennie Cook, had called upon the accused in the afternoon of that day for an explanation of his conduct toward the child. He was the uncle of Jennie Cook. In consequence of these two relationships of the parties concerned, the accused might well suppose that he felt a deep interest in the controversy and might very naturally participate in any attempt which the Cooks might make upon him. No threat on the part of the accused against any one is proved until after the killing of Turner, and, at the time of the assault upon him, he declined combat and endeavored to avoid it. These facts, accompanied by proof of the previous threats against him, tended to show his possession of the weapon to be consistent with a lawful purpose and to negative any motive of revenge or other ill feel-

ing towards his assailants, or the deceased, which might arise from the possession thereof.

The evidence of communicated threats, although purporting to have been made by Jennie Cook, or all the Cooks, but not by Turner, was admissible for another reason. The evidence of conspiracy among the Cooks is amply sufficient to take the case to the jury on the question, whether they confederated and conspired to injure the accused. *State* v. *Prater*, 52 W. Va. 132. Turner accompanied them from their home toward the place at which the assault was made, very shortly before it occurred, and was found at the place which the evidence indicates was appointed by the Cooks for their rendezvous. He was present while the assault and beating were in progress, and near enough to render assistance. His relation to the Cooks, being the uncle of Joseph Cook's wife, was such as was calculated to make him feel an interest in the matter. He was the father of the child concerning whom the original trouble had arisen. Two witnesses swear that he actually participated in the assault. All these circumstances tend to prove that he had knowledge of the common design and purpose of the Cooks, and, if having such knowledge, he joined in that purpose and design, he made himself their co-conspirator and was as much at fault as the Cooks themselves. The threats previously communicated to the accused, if any, together with the assault, constituted evidence of ground for a reasonable belief on his part that he was then and there the victim of a conspiracy, and, if the deceased joined in the assault, he was their co-conspirator. Upon this evidence, it was the right and duty of the jury to inquire whether the provocation involved in the attack upon the accused was provocation given by Turner as well as by the Cooks. The legal effect of such provocation touches and bears upon the nature of the offense, if the shooting of Turner was intentional, as the testimony of some of the witnesses indicates, and not accidental. The intentional taking of life in hot blood and under excitement, occasioned by sufficient provocation, is not murder, but manslaughter. *State* v. *Beatty*, 51 W. Va. 232. Voluntary manslaughter is the intentional, unlawful and feloneous, but not deliberate or malicious, taking of life. The common law definition of involuntary manslaughter is an unintentional killing, resulting from an unlawful act on the part of the

accused, not amounting to a felony, or from a lawful act, negligently performed. Whar. Hom. sections 4, 5 and 6. As the shot was fired immediately after the assailants of the accused had released him, it was the duty of the jury, upon their oaths and honest belief, from all the evidence, to say, in view of this provocation, if they believed there was a conspiracy of which the accused had knowledge, whether the firing of the shot which killed the deceased was intentional, and, if so, whether it was the result of passion. anger and excitement, occasioned by the assault of the conspirators, and, if so, to return a verdict of guilty of manslaughter. But if, on consideration of all the evidence, they believed the shot was unintentional, they should have acquitted, and if, from all the evidence, they believed the shooting was deliberate and malicious, as well as intentional, their verdict should have been guilty of murder.

Since the degree of the offense, when the killing is intentional and the evidence tends to establish provocation, as known in the law of manslaughter, depends upon the mental condition of the accused, he is entitled to prove all the facts and circumstances that tend to show reasonable ground for belief on his part that the deceased was a party to the assault made upon him. If Jennie Cook had made the threats, and Turner had accompanied her when she came to him to obtain satisfaction and then appeared at the place of the assault with the Cooks, these were circumstances tending to produce belief, on the part of the accused, that Turner had joined them in purpose and design. The evidence of the threats, therefore, became material, although the jury might disbelieve the testimony as to Turner's having joined in the assault. "Where two conspire to kill or inflict grave bodily injury on a third person, and in carrying out this purpose, one of them fires a pistol at such person, who immediately pursues them and kills the one who did not fire the pistol, it is manslaughter." *State* v. *Gaskins*, 93 N. C. 547. To the effect that, in determining the degree of the offense, the jury must consider the knowledge and belief of the accused, as to the attitude of the deceased towards him during the assault, and are not controlled by his actual attitude, see 21 Am. & Eng. Ency. Law 185. "If two be fighting, and another interfere with intent to part them, but do not signify such intent, and

he be killed by one of the combatants; this is but manslaughter: for the latter might think that he came in aid of his opponent, unless he had notice of his real intent." 1 East P. C. 292. "The statute does not require the actual occurrence of an insult, either by words or conduct, but it is sufficient that the accused acted on information given by another, if he believed it, and the killing was done in consequence of passion thereby aroused, though in fact no insult had been given. The homicide must be viewed from the standpoint of the accused." 21 Am. & Eng. Ency. Law 181.

It has been suggested that failure of the attorneys for the accused to state to the court, when objection was made to the questions, what they expected to prove in response thereto, precludes a reversal for this error. To make such an error cause of reversal, it is only necessary that the relevancy and materiality of the evidence offered shall appear. When this is not disclosed by the nature of the question, it is necessary that it be made to appear in some other way, and this is usually done by statements of counsel, showing what he expects to prove and how it becomes relevant to the issue. Until a comparatively recent date, there was no suggestion of necessity for the statement of the anticipated answer of the witness, when the question, viewed in the light of its subject matter, the evidence in the case and the issues, disclosed its relevancy and materiality. Commencing with *Kay* v. *Railroad Co.*, 47 W. Va. 467, this Court has, from time to time, added this requirement, relying for its authority, for the most part, upon *Childress' Admx.* v. *Railway Co.*, 94 Va. 186; *Ins. Co.* v. *Pollard*, 94 Va. 146; *Kimball* v. *Carter*, 95 Va. 77, and *Railway Co.* v. *Reiger*, 95 Va. 418. It is asserted in *Sesler* v. *Coal Co.*, 51 W. Va. 318, and *Thomas* v. *Electrical Co.*, 54 W. Va. 395. In the older Virginia decisions, having binding authority upon this Court, this requirement is not found. In *Carpenter* v. *Utz*, 4 Grat. 270, the court say it must appear, from a statement of the evidence offered and excluded, that error has been committed, in order to reverse a judgment; or, if its relevancy depends upon other facts in the cause, the party alleging the error, should present such a case on the record as shows the relevancy of the evidence rejected. They further say testimony which does not appear of itself, or upon the facts

stated in the record, to have been relevant, will be held in the appellate court to have been properly excluded. In that case the court undoubtedly heard the evidence offered and then passed upon its relevancy. It did not refuse to allow the party to disclose by his witness what he desired to prove. In other words, it did not sustain objections to proper questions asked, nor is there anything in the opinion which, in any degree, sustains the position that the court may refuse to permit a witness to answer a question, which, on its face, discloses the relevancy and materiality of its subject matter. *Johnson* v. *Jennings*, 10 Grat. 1, 60 Am. Dec. 323, only requires the bill of exceptions to show relevancy of the excluded evidence; and an examination of the opinion discloses that the evidence was before the court, but there was nothing in it from which the court should see that it was relevant. Those parts of the syllabus and opinion which say the bill of exceptions must show the answer of the witness, as well as the question, relate to the admission of alleged improper evidence. Of course, where evidence has been admitted, the court cannot say it is prejudicial without knowing what it is. That is the ruling in *Beirne* v. *Rosser*, 25 Grat. 537. This Court held the same in *Vease* v. *Capehart*, 15 W. Va. 299. This rule is invariable in all courts. *Mays* v. *Deaver*, 1 Ia. 216; *Speers* v. *Fortner*, 6 Ia. 553; *Mosier* v. *Vincent*, 34 Ia. 478; *Willey* v. *Hall*, 8 Ia. 62; *Campbell* v. *Chamberlain*, 10 Ia. 337; *Hanan* v. *Hale*, 7 Ia. 153; *Howard* v. *Patrick*, 43 Mich. 121; *Somerville* v. *Richards*, 37 Mich. 299; *Lawrence* v. *Com.*, 86 Va. 573; *Smith* v. *Ins. Co.*, 60 Vt. 682; *Carpenter* v. *Corinth*, 58 Vt. 214. In this class of cases, the party loses the benefit of his exception by no improper action of the court, but by his own failure to have a record made of what transpired. *McDowell's Exr.* v. *Crawford*, 11 Grat. 377, decided by a divided court, held it error in the trial court to refuse to permit a witness to be recalled and to have produced certain books which had never been tendered as evidence in the court below, but the nature of the contents of which had been disclosed by oral testimony.

In *Gunn* v. *Railroad Co.*, 36 W. Va. 165, this Court said: "Where the form of the question propounded to the witness on the stand indicates, of itself, that it is framed and intended to elicit in reply something said at the time and place of the

accident as part of the *res gestae*, *held*, it is error to refuse the question, but the answer should be heard or seen, and then its competency passed upon." This has never been overruled by any express reference to it. In *Jackson* v. *Hough*, 38 W. Va. 236, it is recognized and the two cases distinguished in the following language: "This question does not itself, like that in *Gunn* v. *Railroad Co.*, 36 W. Va. 165 (14 S. E. Rep. 465,) import proof of anything but that single fact, which itself would be immaterial." The question in *Jackson* v. *Hough*, related to an isolated fact, which, without other evidence connecting it with the issue, would have been irrelevant. The ground of its exclusion was not failure to say what the answer would be, but want of anything in the question to show its materiality. The distinction marked in *Jackson* v. *Hough*, seems to have been lost sight of in *Kay* v. *Railway Co.*, 47 W. Va. 467, where the syllabus in the former is quoted as importing that the answer must be given in order to show materiality, when the question is itself disclosed. Then that case is followed by the other late cases to which reference has been made. The result is that we have two rules, in consequence of which it becomes necessary to determine which is the correct one.

Many cases from other states hold that, in order to make an exception to the action of the court in refusing to allow a witness to answer a question, the record must show what the answer would have been, if permitted. See *Spaulding* v. *Jennings*, 173 Mass. 65; *Springer* v. *Pritchard*, 22 Nev. 313; *McGowan* v. *Railroad Co.*, 95 N. C. 417; *Railroad Co.* v. *Cheek*, 152 Ind. 663; *Paddleford* v. *Cook*, 74 Ia. 433; *Small* v. *Navigation & Mining Co.*, 40 Me. 274; *Sullivan* v. *Schultz*, 22 Mont. 541; *LeMay* v. *Brett*, 81 Minn. 506; *Kraxberger* v. *Roiter*, 91 Mo. 404; *Fire Ins. Co.* v. *Berg*, 44 Neb. 522; *Hummel* v. *The State of Ohio*, 17 O. St. 628; *Railroad* v. *Stonecipher*, 95 Tenn. 311; *Felker* v. *Grant*, 10 S. D. 141; *Avery* v. *Wilson*, 47 S. C. 78; *Roach* v. *Caldbeck*, 64 Vt. 593. After careful consideration of *Carpenter* v. *Utz* and *McDowell's Exr.* v. *Crawford*, I am convinced that they are not in conflict with this rule. In the former, the excluded evidence appeared in the record. It was not a case of refusing merely to allow a proper question to be answered. In the latter, the offered evidence was documentary, and the

record disclosed its existence and character. *Gunn* v. *Railroad Co.* is the only Virginia or West Virginia case enunciating the rule therein stated. As authority for it, *Scotland Co.* v. *Hill*, 112 U. S. 183, was cited. At that date, it seemed to be about the only case of its kind. As the opinion was delivered by Chief Justice Waite, it was entitled to great respect, although he cited no precedent or authority for it, and admitted that other courts had held to the contrary. In *Patrick* v. *Graham*, 132 U. S. 627, the opposite rule was rigidly enforced. The only other case found, sustaining *Gunn* v. *Railroad Co.*, is *Commissioners* v. *Gantt*, 78 Md. 286. The late decisions of this Court are all the other way. In addition to cases already cited, see *Snooks* v. *Wingfield*, 52 W. Va. 441, 448; *Williams* v. *Belmont &c. Co.*, 55 W. Va. 84. This accords with the great weight of authority everywhere. 2 Cyc. 1045; 3 Cyc. 165, citing numerous cases; Elliott App. Pro. §§ 743 and 744. In view of this vast array of authorities, we are bound to say that, if *Gunn* v. *Railroad Co.* has not been already overruled, as regards this question of practice, it must now be disapproved and declared to be not law in this State. Error must affirmatively appear in order to reverse. It cannot, in any case, be presumed. To reverse this judgment for refusal to allow these questions to be answered, it would be necessary to assume that the witness could have answered them favorably to the accused. That, the Court cannot do, however unfortunate the result may be.

The first instruction complained of set forth six forms of verdict: guilty of murder in the first degree without recommendation, guilty of murder in the first degree with recommendation of imprisonment, guilty of murder in the second degree, guilty of voluntary manslaughter, guilty of involuntary manslaughter and not guilty, and told the jury that, under the indictment, they could return any one of said verdicts. Instructions Nos. 2. 3 and 4 are as follows:

2. "The Court instructs the jury that to constitute a willful, deliberate and premeditated killing, constituting murder of the first degree, it is not necessary that an intention to kill should exist for any particular length of time prior to the actual killing; it is only necessary that said inten-

tion should come into *existance* for the first time at the time of such killing, or any time previous.

3. "The Court instructs the jury that where a homicide is proved, the presumption is that it is murder in the second degree. If the State would elevate it to murder in the first degree she must establish the characteristics of that crime, and if the prisoner would reduce it to manslaughter, the burden is on him.

4. "The Court instructs the jury that a man is presumed to intend that which he does, or which is the immediate or necessary consequence of his act; and if the jury believes from the evidence in this case that Paul Clifford, the prisoner, with a deadly weapon in his possession, without any, or upon a very slight provocation, gave to the deceased, Jacob Turner, a mortal wound, then the said Paul Clifford is *prima facie* guilty of willful, deliberate and premeditated killing and the necessity of proving extenuating circumstances is thrown upon the prisoner; and unless the prisoner has proved such extenuating circumstances, or such circumstances arise out of the case made by the State, the jury must find the *ptisoner* guilty of murder in the first degree."

The objection to instruction No. 1 is that it contains no reference whatever to the evidence. Failure to qualify it by saying that, in order to return any one of said verdicts, the jury must believe the defendant guilty of the offense named in the verdict, is the basis of criticism. The court, no doubt, intended nothing more than to advise the jury as to their power, if, from the evidence, they believed the defendant guilty of any one of the offenses charged in the indictment, to find accordingly. The other instructions given for the State do not supply this defect, if defect it be, by saying any verdict the jury should find must rest upon their belief from the evidence, but, in the instructions given for the defendant, three in number, the attention of the jury is specifically and repeatedly directed to the requirement of the law that their verdict must rest upon the evidence and their belief therefrom of the guilt of the accused beyond a reasonable doubt. Though instruction No. 1, standing alone and unaided by other instructions, might be erroneous, it is correct as far as it goes, and the defect in it having been

supplied by other instructions, the defendant cannot be deemed to have been prejudiced or injured thereby. A similar instruction was given in *State* v. *Prater*, 52 W. Va. 132, 154, and an assignment of error was predicated thereon, but the Court refused to disturb the verdict on account thereof. If an instruction correctly states the law as far as it goes, and is defective only in failing to state all that should be said in reference to its subject matter, the court commits no error in giving it, provided the defect is supplied by another instruction given. *State* v. *Clark*, 51 W. Va. 457, 462; *State* v. *Prater*, 52 W. Va. 132.

The last clause of instruction No. 2, relating to the element of intent in the crime of murder, says "It is only necessary that said intention should come into *existance* for the first time at the time of such killing, or any time previous." The existence of such intent at the time of the killing is a necessary ingredient of crime, and it is clearly not enough that the prisoner intended such purpose at some previous time. The jury must be satisfied beyond a reasonable doubt that though he entertained such purpose before the killing, it must have continued and moved him in the act of the killing. The instruction correctly quotes the law as laid down in *Wright's Case*, 33 Grat. 890, and approved in *State* v. *Morrison*, 49 W. Va. 210, 217, and, no doubt other cases decided by this Court. But, in these decisions, it is given as abstract law, addressed to the legal profession, and not as a formula for the guidance of a jury of laymen in the trial of a case, and is not as accurate as it might be for that purpose. However, it seems to have been deemed, by the prisoner and his counsel as well as by the attorney for the state, unnecessary to advise the jury of the necessity of the existence of criminal intent at the very moment of the killing. Two instructions relating to the element of intent were given at the instance of the accused, in neither of which was the attention of the jury directed to this point. The irresistible inference is that it was so plainly and palpably obvious to the jury as to render such action useless. The plain object of the instruction is set forth in the first clause thereof. It was to relieve the jury of any difficulty they might encounter from finding that the conception of a design to kill and the act of killing were contemporaneous. The

last clause pursues the same object. It relates to the time of forming the intent, assuming it to have continued until the time of the killing. This is the plain sense and meaning of the instruction, and the court cannot assume that a jury of reasonable and prudent men would probably be mislead by it. A judgment cannot be reversed except for some act of the court which may have prejudiced the party complaining. Though there be inaccuracy of statement of an instruction, it does not amount to an error, unless it is calculated to mislead the jury and may have done so, and did, for aught that the Court can see. In determining whether it may have had such effect, the Court must view the language as having been addressed to men of, at least, average intelligence. There is no other standard by which to test it. So viewing this instruction, we are unable to say it could reasonably have had such effect, and it is evident that counsel on both sides, looking at the instruction from the same point of view, having the advantage of personal presence at the scene of the trial, knowledge of the jurors, the tenor and course of the argument and all that transpired before the jury, were of the same opinion. Therefore, we hold that no error was committed in giving it.

The objection to instructions 3 and 4 are substantially the same as were urged against them in the case of *State* v. *Taylor*, (50 S. E. 247), 57 W. Va. 228. A further contention against the propriety of these instructions is the lack of evidence that the accused was the aggressor, or in any way in fault, at the time the assault was made upon him, and the presence of evidence tending to show that the discharge of the pistol was accidental and unaccompanied by any criminal intent. After a careful inquiry as to the propriety of giving such instructions, this Court declared in *State* v. *Taylor*, as follows: "When the state of the evidence in a criminal case tends to prove facts, from which presumption of guilt arise, under rules of evidence, established by a long and uniform course of judicial determination, the trial court may properly bring them to the attention of the jury by instructions, aptly and correctly stating them. Such instructions, if properly framed, neither assume the existence of the facts, from which the presumptions arise, nor interfere with the province of the jury as to the weight of the evidence." Their application

therefore, depends upon the state of the evidence. If there is any evidence tending to prove the offense of murder of the second degree and murder of the first degree, the court did not err in giving these instructions. Upon one view of the evidence, its tendency is to prove the Cooks to have been the only actors and Turner an innocent bystander. Certain witnesses testify that he stood at the place at which he was found dead, from the beginning, until the end, of the affray, with his hands in his pockets, and one witness at least says his hands were still in his pockets when found dead. If he did not participate in the assault, as stated by the accused and another witness, the evidence as to his connection with the conspiracy is purely circumstantial. One witness testifies that the accused, after rising, took one step toward the deceased, stopped, looked at him a minute and then fired. The testimony tending to prove these things as circumstances constitutes evidence of intentional, deliberate and malicious shooting, although the jury must, in the same connection, consider whether the accused had reasonable ground to believe, and did believe, the deceased was a co-conspirator and present as an aider and abettor, but taking no actual part in the assault, in order to determine whether the accused is guilty of anything more than manslaughter. It therefore affords foundation and justification for the giving of these instructions. Other instructions in the case present other and different theories, founded upon different and conflicting tendencies of other portions of the testimony and circumstances shown. In determing what instructions shall be given the court does not consider the weight of any evidence. It simply lays down rules for the analysis and application thereof by the jury. It is enough that there is evidence appreciably tending to prove or establish a certain theory of a case, however slight the degree of its weight. And a court need not withhold an instruction for paucity of evidence, if there be any, tending, in any appreciable degree to establish the hypothesis embodied in the instruction. In *Hopkins* v. *Richardson*, 9 Grat. 485, Judge Lee, speaking for the court, said: "In a plain case of a total absence of evidence tending to make out the supposed case, the court may well refuse to give any instruction based upon it. But where there is such evi-

dence, of however little weight it may appear to the court, or however inadequate in its opinion, to make out the case supposed, it is best and safest for the court not to refuse to give the instruction asked for, if it propound the law correctly." See also *Early* v. *Garland's Lessee*, 13 Grat. 1; *Honesty* v. *Commonwealth*, 81 Va. 283; *Fire Association* v. *Hogwood*, 82 Va. 342. Certain decisions of this Court may seem to be in conflict with the above quoted doctrine of the early Virginia decisions. Certain it is that some general expressions used in them indicate deviation from the rule declared by them. *Bloyd* v. *Pollock*, 27 W. Va. 75, holds that a court should not give an instruction based upon an hypothesis, though supported by some evidence, if the evidence is so weak that the court would set aside a verdict based thereon. *State* v. *Belknap*, 29 W. Va. 427, says the evidence must fairly tend to prove the facts upon which the instruction is based. *Parkersburg Industrial Co.* v. *Schultz*, 43 W. Va. 470, holds that the hypothesis embodied in the instruction must be fairly presented by the evidence. *McDonald* v. *Cole*, 46 W. Va. 186, holds that the evidence must fairly present the hypothesis and be sufficient to sustain a verdict predicated thereon. No authority whatever is cited in the first three of the above decisions for the propositions asserted in them. The last one cites *Bloyd* v. *Pollock*, and *Industrial Co.* v. *Schultz*. In *Carrico* v. *Railroad Co.*, 39 W. Va. 86, the ruling in *Bloyd* v. *Pollock*, was virtually condemned and those of the early Virginia cases above cited approved to this extent, that this Court will not reverse because the court below gave an instruction predicated upon evidence "though that evidence be very weak in the opinion of this Court." *Carrico* v. *Railroad Co.* would be sufficient authority for refusing to disturb the verdict on account of the giving of instructions 3 and 4, as not having been based upon sufficient evidence. But a new trial is allowed on another ground and the case must go back Therefore, this Court must say whether it is the duty of the trial court to determine, in passing upon the propriety of the instruction complained of, to weigh the evidence and see whether it will sustain the hypothesis presented by the instruction. To so hold would put it in the power of the court to take any case from the jury, when the evidence

on one side seems to be too weak to sustain a verdict in favor of that side, and this, without any motion or application for such action by either of the parties. Since the parties are content to proceed in the exercise of their constitutional right of trial by jury, however weak their respective cases may be, it seems that an interference by the court, upon its own motion, would be a virtual denial of such right. Until the court is asked to interfere, its duty is merely to preside over the trial by the jury. Decision after decision says the weight of the evidence during the progress of the trial, and until after verdict, is for the jury and not the court, and any instruction or other action of the court, invading the province of the jury, by direction as to the weight of the evidence, is cause of reversal. After verdict, when the jury has completed its work and the parties have had the benefit of the constitutional guaranty, the function of the court begins, upon a motion to set aside the verdict for insufficiency of evidence. The law regards jurors as being better calculated to weigh evidence than judges. A suitor may prefer the judgment of twelve men upon the weight of his evidence to that of one man upon the bench, and, however, weak or strong his case may be upon the evidence, he has the right to proceed with it before the jury until, upon some proper application, such as a motion to direct a verdict, a motion to exclude evidence, or a demurrer to the evidence, the court has no right to interfere. The cases which seem to be in conflict with this view are only so in the generality of the expressions used in the syllabi and opinions. An analysis of the evidence shows that it did not really tend, in any appreciable degree, to sustain the hypothesis stated in the instructions. In some of them, there was none. "It is not for the court, in ruling upon evidence, or in framing instructions, to determine the probative force of evidence. If the evidence is material, relevant, and competent, it is for the jury, and instructions bearing upon the evidence, without respect to its weight or credibility, cannot be deemed irrelevant. Accordingly, an instruction cannot be deemed erroneous if there be any evidence on which to base it, no matter how slight and inconclusive that evidence may be." 11 Enc. Pl. & Pr. 181, citing decisions from Alabama, Arkansas, Georgia, Illinois, Indiana, Iowa, Missouri, Nebraska, Ohio, South

Carolina,, Texas and Virginia. The very excellent work just quoted from qualifies this only to the extent of saying an instruction should not be given upon evidence which raises at the most a mere conjecture, nor upon evidence which is so slight as to amount merely to an assumption. Nowhere does it state that the evidence to warrant an instruction must be sufficient to support a verdict founded upon it. This constitutes no exception to, or qualification of, the general rule above stated, and that rule seems to be universally observed, except in the general expressions found in some of the decisions of this Court and heretofore referred to.

Freedom from fault on the part of the accused, at the inception of the assault upon him, is a circumstance in his favor on the issue as to whether he is guilty of any offense graver than that of manslaughter, but it is clearly not conclusive in his favor, and, therefore, does not preclude the giving of instructions predicated upon the theory of murder. One who is attacked without cause, and having the greatest provocation, may nevertheless be guilty of murder. "Where the killing, although intentional, is done in passion, in heat of blood, upon sudden provocation by gross indignity, out of tenderness for the frailty of human nature, the law reduces the offense to manslaughter, but, however great the provocation may have been if there has been sufficient time for passion to subside and for reason to return, the homicide is murder." *State* v. *Beatty*, 51 W. Va. 232; *Mc Whirt's Case*, 3 Grat. 594; Whar. Hom. 448. The time intervening between the cessation of the beating and the firing of the shot which killed the deceased was very short, according to all the testimony, but there was an intervening period, and whether there was sufficient time for reason to regain its sway, depends upon other circumstances, such as the temperament of the accused, the nature of the provocation, his surroundings, etc., as well as lapse of time. Whar. Hom. section 449. Another element entering into the case is, whether there was any provocation on the part of the deceased, within the meaning of the law, a matter concerning which a good deal has been said herein.

Does the defense of accidental killing render these instructions improper? It is urged, upon the authority of *State*

v. *Cross*, 42 W. Va. 253, that it does. The theory upon which the majority of the Court reached a conclusion in that case is made very plain by the opinion. They said "There was no evidence of premeditated or intentional killing." If not, no instructions based upon such theory could properly be given and every instruction that presented any hypothesis of guilt of such offense was held improper. In the course of the opinion, want of evidence is repeatedly adverted to, and on page 257, it is said: "This instruction was improper, in this case, for the same reason that all the others were improper." This case, as practically all others, presents a number of issues and theories. Some of them are inconsistent necessarily. If they were not, there could be but one view of the case. The defendant himself presents inconsistent theories, and has a perfect right to do so, and it is the duty of the jury to adopt that one, whether presented by the State or the prisoner, which, upon their oaths, they believe, beyond a reasonable doubt from the evidence, to be the true hypothesis. A proper instruction upon one theory should not be refused because it is inconsistent with a proper instruction based upon another. What modification of the two instructions here under consideration would be necessary to keep before the jury, without the aid of any other instruction, the defense of accidental killing? Nothing more than to insert in instruction No. 3 the word "intentional" before "homicide", and in No. 4 the word "intentionally" before the word "gave." If this had been done, what basis would there be for the contention against the propriety of these instructions? Absolutely none that could be founded upon their language or terms. Not a word in these instructions countenances the view that the killing would be murder in the absence of the element of intent. They assume nothing except that the jurors, as intelligent men, know that acccidental killing is not criminal. Two instructions given for the defendant impressed upon the jury in the strongest terms the necessity of the existence of intent, on the part of the accused, to kill the deceased, as a prerequisite to their finding him guilty of any offense. All these instructions taken together, and the jury had them all before them at the same time, cannot be so read as to leave the jury without instruction or guidance on the ques-

tion of intent; nor, when read together, is there any contradiction in their meaning, though there may be a techincal one in terms. "The instructions given to the jury must be taken together; and it is not necessary to insert in each separate instruction all the exceptions, limitations and conditions which are inserted in the instructions as a whole." *State* v. *Dodds*, 54 W. Va. 289. "Instructions to the jury must be taken and read as a whole, and, if, upon being so read and construed, they state the law correctly, and do not misstate it in any particular, and no proper instruction, asked for, has been refused, the verdict will not be disturbed on the ground that additional proper instructions could have been given, or that some particular instruction, standing alone, might tend to mislead the jury." *State* v. *Kellison*, 56 W. Va. 690.

A motion made to the court for a new trial on the ground of insufficiency of evidence, presents an entirely different question from that which arises upon a request for an instruction. Upon such motion the court has more extensive powers to deal with the evidence. The jury trial is complete. The function of the jury has been performed and that of the court begins. By his motion, the accused appeals from the decision of the jury to the court on a question of law. He prays the judgment of the court as to whether the evidence upon which the jury has founded its verdict is sufficient in law to sustain it. By his own act, he brings the question before the court. In entertaining this motion the court does not officiously meddle with the province and function of the jury, or the rights of parties, respecting jury trial; but simply takes under advisement and consideration the legal question presented, and, after argument and mature consideration, disposes of the motion. In this way, all confusion in, and danger of prejudicing, the jury trial, by hasty and ill-considered rulings, are avoided. In sustaining a motion to set aside a verdict on this ground, the court does not undo anything the jury has legally performed. It simply restores to the party what the jury, in contemplation of law, has deprived him of, or withheld from him. It is in no sense a re-trial of the case by the court, on the evidence, as the jury tried it. The court merely ascertains, from all the facts which were found by the jury, or could have been found,

whether the elements necessary to make out title to the right in action, or to constitute the crime charged are shown, and then declares the law accordingly.

It was held in *State* v. *Henry*, 51 W. Va. 283, that in criminal cases, the court, in passing upon a motion for a new trial, will reject all conflicting oral evidence of the exceptor and give full faith and credit to that of the adverse party, as was formerly done in civil cases. Whether there is any reason for discriminating between civil and criminal cases in this respect, it is not necessary to determine now; for nothing presented by the evidence in this case would produce a result, under the operation of the new rule, different from that which is produced by the application of the old one. Having disregarded the conflicting oral evidence, adduced on behalf of the accused, it still appears that there was gross provocation to the accused, growing out of the transaction between him and the son of the deceased. The deceased was present at the assault and the accused knew the relationship existing among all these parties, as well as the purpose for which the Cooks had accosted him. As Turner was present, it is not to be assumed that the accused did not know he was there. Therefore he had resonable ground for believing that the purpose of this assemblage was to inflict bodily injury upon him. This was done in a most unequal contest, as regards physical strength, two men assailing one. For the purposes of this inquiry, it must be assumed that the fatal shot was intentionally fired toward the deceased. If the shooting had occurred during the progress of this fight, the jury could not have said, without disregarding the evidence, that the accused was not then in a high state of passion and excitement, such as to preclude a finding of deliberate shooting. It did not occur until after his assailants had left him, but it did occur immediately after. J. T. Carter, one of the witnesses for the State, says: "He made about one step towards Jake and then shot." On cross-examination, the same witness said the accused had fired "Just as quick as he could get himself together." Robert Spears made the following statement in answer to a question: "Why Paul made one step toward Jake and he looked at him for about a minute and he fired." On cross-examination he said: "Paul made one step towards Jake and shot." This is all the

evidence that could be regarded as tending to show time for the subsidence of passion. According to Carter's testimony, there was no act on the part of the accused indicating reflection. The other witness's testimony is very indefinite. "About a minute" is absolutely devoid of any certainty, for it is a phrase very commonly used to denote a mere point of time and not the lapse of any certain period. This testimony rather implies that there was a halt, as if for deliberation, before the firing of the fatal shot, but it is wholly uncertain as to the purpose. It all occurred in the darkness of night. Was it for deliberation or for the purpose of locating the man who had been beating him? However this may be, it was almost imperceptible, and indicated no departure from the struggle which had preceded it. There was no turning aside to some other and distinct matter, such as a social or business transaction, indicative of relaxation of the passion which confessedly had dominated the mind of the accused up to that point. This is too slight to sustain a finding of such subsidence or relaxation.

In *State* v. *Beatty*, 51 W. Va. 232, it was held that, "When time has intervened between the date of provocation and the date of the killing, the question whether the killing was done in the heat of blood is for the jury." The application of this law requires evidence of the lapse of some period of time within which the jury might deem it reasonable to say either that reason had regained her sway, or, if not, it is reasonable to suppose that the accused had nursed and fed his anger and deliberately kept it alive. What is the rule where there has been no such lapse of time? Is the question of intent one for the jury under all circumstances, without regard to the existence or non-existence of a "cooling period?" It is often said by the authorities that intent is a question of fact, the determination of which is peculiarly within the province of the jury. It is to be observed, however, that this most frequently occurs in the discussion of the action of the court in giving or refusing instructions. As has been indicated, these rulings are made without reference to the weight or probative force of the evidence, and the declarations made by the courts of review, respecting them, are not applicable, when it is the duty of the court to deal with the weight of the evidence. A great many decisions hold that it is the duty

of the court to grant a new trial when the facts disclosed by the evidence are not such as to justify the finding of the jury. Is it true that in every case in which it appears that the accused has taken the life of his fellow-man, and the jury has found him guilty, after weighing the evidence under proper instructions by the court, neither the trial court nor the appellate court can grant a new trial because the question of intent is, under all circumstances, one of fact for the jury? The authorities answer this in the negative. In numerous instances, convictions of murder have been reversed because the evidence did not justify them. *Guilford* v. *State*, 24 Ga. 315; *Thompson* v. *State*, 1 Tex. Cr. Rep. 1: *State* v. *Brown*, 15 Rich. (S. C.) 59; *People* v. *Kohler*, 49 Mich. 324; *Hayward* v. *People*, 96 Ill. 492; *Holly* v. *The State*, 29 Tex. 141; *Leake* v. *The State*, 29 Tex. 144; *Ake* v. *The State*, 31 Tex. 416; *Harris* v. *The State*, 36 Ark. 127; *Miller* v. *The State*, 74 Ind. 1; *Petty* v. *The State*, 65 Tenn. 610; *Brown* v. *The State*, 7 South. R. 359.

The better opinion seems to be that in criminal, as well as civil law, there are certain limits within which the jury must be confined. They cannot find the elements of murder or any other offense when the evidence wholly fails to establish them. That a grievous provocation immediately resented with violence, resulting in death, reduces the offense from murder to manslaughter, is a rule of law, seems to be asserted by all the books. In *McWhirt's Case*, 3 Grat. 594, the court entered upon a long and laborious analysis of the evidence, on the motion for a new trial, for the purpose of determining whether sufficient time had elapsed between the provocation and the killing to allow the passion of the accused to subside. Had it been a mere question for the jury and not for the court, why did not the court dispense with such a useless performance as a review of the evidence on the motion for a new trial? Though this Court has not, in many instances, if any at all, set aside verdicts in cases of homicide, because of insufficiency of evidence, the decisions do not deny to it the power to do so in any case in which it ought to be done. In *State* v. *Scott*, 36 W. Va. 704, this Court said: "It is quite true that the fatal blow struck by the prisoner with an unlawful weapon of deadly character was given in what might be termed a chance med-

ley or affray, which occurred in an unpremeditated manner. If the prisoner had been able to prove that he himself was entirely blameless in the quarrel which thus fatally resulted, and that his assailant was bent upon inflicting great bodily harm, these circumstances ought to have reduced his offense to manslaughter. But the evidence of the State would seem to justify the jury in concluding that the prisoner started the quarrel by very boisterous and unseemly behavior, where the deceased and his companions, including two women, were engaged in drinking beer; that, when asked to desist, the prisoner retorted with foul and abusive epithets, and that he thus provoked the quarrel, and concluded it by throwing a two-pound iron weight with deadly aim at his antagonist, who could not have been distant from him more than eight or ten feet. Furthermore, he himself in his testimony, states that before throwing it he 'steadied' himself; and further evidence of the State tends to show that he must have advanced two or three steps toward his adversary. The commencement of the quarrel by him, and the violence of his resentment out of proportion to the provocation, tended to prove that malignity of disposition which the law defines to be malice towards mankind." The principle here asserted is that a homicide on a gross provocation is manslaughter only; but the prisoner put himself beyond that rule by provoking the quarrel, inducing a provocation to himself and resenting it by means wholly disproportionate to the injury thus brought upon himself. This conduct shed light on the intent. In *State* v. *Clark*, 51 W. Va. 457, the Court refused to set aside a verdict of murder, where the killing had resulted from a quarrel or controversy, but it was expressly held that the deceased had not done any act which the Court could say, as matter of law, amounted to such provocation as would reduce the offense from murder to manslaughter. It was, therefore, a question for the jury. In other words, there was evidence sufficient to sustain the verdict.

In *Rex* v. *Ayes*, R. & R. 166, the twelve judges of England, in the year 1810, on a question reserved by the trial court, expressly decided that the question of malice is not one solely for the jury. The syllabus of the case briefly states the decision and facts of the case as follows: "After mutual blows between the prisoner and the deceased, the

prisoner knocked the deceased down, and, after he was upon the ground, stamped upon his stomach and belly with great force. Held manslaughter only." The statement of the case shows that the prisoner had first pushed the deceased down on his back, after which the latter arose and struck the prisoner two or three times with his fist. Then the prisoner pushed him down again on his back, and, as he lay there on his back, gave him two or three stamps with great force with his right foot, and after he had gotten up, kicked him in the face. The jury found the prisoner guilty of murder, and the judges, on a question reserved, ordered the verdict set aside. In Wharton on Homicide, at section 446, the following is stated as sound law: "In an English case, given by Lord Hale, A. and B. were walking together in Fleet Street, and B. gave some provoking language to A., who thereupon gave B. a box on the ear, upon which they closed, and B. was thrown down, and his arm broken. Presently B. ran to his brother's house, which was hard by; and C., his brother, taking the alarm, came out with his sword drawn, and made towards A., who retreated ten or twelve yards; and C. pursuing him, A. drew his sword, made a pass at C., and killed him. A. being indicted for murder, the court directed the jury to find it manslaughter, not murder, because it was upon a sudden falling out, not *se defendendo*, partly because A. made the first breach of the peace by striking B.; and partly because, unless he had fled as far as might be, it could not be said to be in his own defence; and it appeared plainly upon the evidence that he might have retreated out of danger, and that his stepping back was rather to have an opportunity to draw his sword, and with more advantage to come upon C, than to avoid him; and accordingly, at last, it was found manslaughter." Another illustration appears in Wharton on Homicide in section 454, which reads as follows: "Upon an indictment for murder, it appeared that the prisoner and the deceased, who had been upon terms of intimacy for three or four years, had been drinking together at a public house till about twelve o'clock at night; about one they were together in the street, and had some words, and a scuffle ensued, during which the deceased struck the prisoner in the face with his fist, and gave him a black eye. The prisoner called for

police, and, on a policeman coming, went away; he, however, returned again, between five and ten minutes afterwards, and stabbed the deceased with a knife on the left side of the abdomen; the knife, a common bread and cheese knife, was one that the prisoner was in the habit of carrying about with him, and he was rather weak in his intellect, but not so much as not to know right from wrong. Lord Tenterden, C. J.: 'It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the crime from murder to manslaughter; but it depends upon the time elapsing between the blow and the injury; and also whether the injury was inflicted with an instrument at the moment in the possession of the party, or whether he went to fetch it from another place. It is uncertain, in this case, how long the prisoner was absent; the witness says from five to ten minutes, according to the best of his knowledge. Unless attention is particularly called to it, it seems to me that evidence of time is very uncertain; the prisoner may have been absent less than five minutes; there is no evidence that he went anywhere for the knife. The father says it was a knife he carried about with him; it was a common knife, such as a man in the prisoner's situation in life might have; for aught that appears he might have gone a little way from the deceased and then returned, still smarting under the blow he had received. You will also take into consideration the previous habits and connection of the deceased and the prisoner with respect to each other; if there had been any old grudge between them, then the crime which the prisoner committed might be murder. But it seems they had been long in habits of intimacy, and on the very night in question, about an hour before the blow, they had been drinking in a friendly way together. If you think there was not time and interval sufficient for the passion of a man, proved to be of no very strong intellect, to cool, and for reason to regain her dominion over his mind, then you will say the prisoner is guilty only of manslaughter. But if you think the act was the act of a wicked, malicious, and diabolical mind (which, under the circumstances, I should think you hardly would), then you will find him guilty of murder."

It may be supposed that the uncertainty in the evidence as

to whether the prisoner fired at the deceased, thinking him to be Charles Cook, who, just about that time, ran in the direction of the deceased, or fired, knowing the party to be the deceased, constitutes an insuperable obstacle to the reversal of this judgment. If the accused fired at Cook in a transport of passion, and, by mistake, killed Turner, many cases, holding that the degree of the offense would be the same as it would have been had Cook been killed, are to be found among the reported decisions. "And so in cases where the blow intended for one person by accident falls upon and kills another, the thing done follows the nature of the thing intended to be done, and the guilt or innocence of the slayer depends upon the same considerations that would have governed had the blow killed the person against whom it was directed. Hence the homicide is murder, or manslaughter, or excusable homicide, for precisely the same reasons that would have determined its character had the event conformed to the intent; and the principle is the same whether the misadventure proceeded from the misdirection of the blow or from a mistake in the identity of the victim." 21 Am. Eng. Ency. Law 105, citing a number of decisions which fully sustain the text. See also 1 Bish. Cr. Law, section 334; *Plummer* v. *State*, 4 Tex. App. 310; *Aaron* v. *State*, 31 Ga. 167.

If the accused knew he was shooting Turner, as is indicated by the testimony of the two witnesses whose testimony has been quoted, the conclusion must be the same, for he had reason to believe that Turner was a party to the conspiracy and was present for the purpose of aiding and abetting the assault made upon him. He knew the relations existing between Turner and the Cooks, and that the assault was the result of the transaction which had taken place between himself and Turner's little boy. The trouble had all grown out of that incident. Jennie Cook had become involved in it, and all the parties concerned were together at the time and the place of the assault. The trivial, insignificant affair had been developed by them, the Cooks and Turner, as their presence indicated, into a sort of family feud against the accused, and all were present for the purposes of visiting, or seeing visited, upon him, a very severe chastisement. Under these circumstances, the jury were bound to find that the

accused was justified in regarding the provocation as having emanated from all of them, or to disregard the evidence and make an arbitrary finding. The prisoner knew himself to be the victim of a conspiracy. Turner had stood by and seen him assaulted by two men, on account of a matter which had its origin in the transaction between himself and the son of Turner. They were all related. He knew, too, that Turner, had been displeased on account of that matter and had consorted with Jennie Cook concerning it. They had come together to him about it. A reasonable view from the standpoint of the prisoner at the time, was that Turner was a party to the conspiracy, and the jury had no right to proceed upon a fanciful theory, having no basis in the evidence.

In view of these principles and conclusions, we think the evidence is not sufficient to sustain a conviction of murder in the second degree, nor of any offense greater than voluntary manslaughter, and that the circuit court erred in refusing to set aside the verdict. The judgment will, therefore, be reversed and the verdict set aside and the case remanded for a new trial.

Reversed.

BRANNON, JUDGE, (*dissenting*).

I dissent because the court reverses only because the evidence is not, in its opinion, strong enough to support the verdict. It thus assumes the office of a jury — or rather takes from a jury its functions. I cannot conceive that this case presents, in this point, a question of law. It is purely a question of fact under evidence. Two witnesses say that the accused, when the Cooks had left him, and were running away, looked at Turner standing ten feet away and fired upon him, while standing with his hands in his pockets. One says the accused looked at Turner a minute and fired. The accused and his father deny this. They do not deny that Turner was ten feet away; but the father says the accused fired as he was in the act of rising from the ground. Here is conflict. There is no conflict as to the exact position of Turner when shot. Nobody says he was beating the accused when shot. This is a critical point in the case. On it turns the degree of the crime, whether murder or voluntary manslaughter. Some evidence says that Turner joined in the battery on the accused

—other evidence denies this. On much evidence the jury found, on these *test questions of fact*, that Turner was not a conspirator with the Cooks, was not a party to the battery, was not assailing Clifford when shot, but standing off silent.

This Court, on this conflict, finds that the evidence of the state, in these important matters, is unworthy of belief, virtually takes the evidence of the father; because if the state's evidence is truthful, the jury could find as it did. There was as much evidence for the state in these vital matters, as for the accused, if not more. In fact, in some of them the evidence of the prisoner's father alone controls. Once it was law that the court need not certify conflicting evidence for appeal, so final was regarded the verdict approved by a judge. Now, it is different; but when such evidence gets into this Court the rule prevails that we cannot defeat a verdict except we reject all evidence of the party against whom the jury decided conflicting with that of the adverse party, and give full faith and credit to the evidence of the latter, and if the remaining evidence tends to or goes fairly to support the verdict, it must stand unless it is *clearly* not sufficient. *State* v. *Chambers*, 22 W. Va. 779; *Kimmins* v. *Wilson*, 8 *Id.* 584; *State* v. *Baker*, 33 *Id.* 319, pt. 4. We treat it as we treat a demurrer to evidence. In *State* v. *Sullivan*, 55 W. Va. 597, we said, on what we thought was sound authority, that the evidence must be considered most favorably to the verdict. But in this instance evidence to support the verdict is discredited, and full faith given to the evidence to overthrow the verdict. Whilst this Court possesses power to defeat a verdict, though the evidence is conflicting, still it should rarely do so, and only do so with extreme caution, and only where the verdict is plainly contrary to right and justice. *Robertson* v. *Harmon*, 47 W. Va. 500. This Court cannot set aside the verdict, in conflict, "merely because it thinks there is a preponderance of evidence against it or doubts its correctness," or would itself have found a different verdict. *Morien case*, 102 Va. 622. Indeed, where evidence conflicts it may be seriously questioned, even at this date, as a matter of strict legal principle, whether an appellate court can grant a new trial; for it has been held that, "upon familiar principles, recognized and approved in numerous cases, when there is a conflict of evidence, an appellate court will never set aside a verdict where

the court which tried the case and heard the witnesses, concurs with the jury and has refused a new trial." *Caldwell* v. *Craig*, 21 Grat. p. 136; note to *Grayson's case*, 6 *Id.* annotated, 712; *Michis* v. *Cochran*, 93 Va. 641, 646; *Seebright* v. *State*, 2 W. Va. 596; *State* v. *Thompson*, 21 *Id.* 741, 756; *Miller* v. *Ins. Co.*, 12 *Id.* 116, 124; *Andrews case*, 100 Va. 801. In *Grayson's case*, cited, it is held "Where the evidence is contradictory, and the verdict is against the weight of evidence, a new trial may be granted by the court which presides at the trial; but its decision is not the subject of a writ of error or *supersedeas*, or examinable by an appellate court." In 14 Ency. Pl. &. Prac. 780, it is laid down that the trial court can weigh conflicting evidence and grant a new trial, but an appellate court cannot. In strict principle I doubt whether a verdict should ever be set aside on evidence materially conflicting, but this Court has sometimes done so, especially under the act found in Codes 1891 and 1899, chapter 131, section 9. See *Johnson* v. *Burns*, 39 W. Va. 658. The opinion by JUDGE DENT in *Akers* v. *De Witt*, 41 W. Va. 229, does not seem to give this statute force to change much the rule of treatment of evidence in the appellate court on a motion for a new trial. I do not think it revolutionizes and tears down established rules in this matter, as I said in the Johnson-Burns case. But what is above said will at least show that rarely, only in extreme cases, will this Court reverse a jury trial on conflicting evidence. But even where there is not involved a conflict of evidence, but the question is one of *weight* of evidence, this Court has said in many cases that "in Virginia and this state the courts have always guarded with jealous care the province of a jury. If the question depends on the weight of testimony or inferences and deductions from the facts proved, the jury, not the court, are exclusively and uncontrollably the judges. This conclusion is based upon the well-established rule, that the jury are the sole judges of the evidence, the credibility of all admissible testimony, and the inferences from the facts and circumstances proved." *State* v. Cooper, 26 W. Va. 338; *State* v. *Baker*, 33 W. Va. p. 335. And this rule has been often said to apply with stronger force in this Court than in a circuit court. *Grayson's case*, 6 Grat. 712; *Sheff case*, 16 W. Va. 307. Why? Because the jury and judge saw the

witnesses face to face and are much more competent to judge of their veracity and demeanor and weight of their evidence than are we. The opinion of Judge Faulkner, a judge of long experience and competency, is therefore better than that of any judge on this bench. So is that of the jury. For this reason we said in *Baker's case*, 33 W. Va. p. 336, upon authority then regarded by the Court good, that "where a case depends on the tendency and weight of evidence, and the jury and judge who tried the case agree in the weight and influence to be given the evidence, it is an abuse of the appellate powers of this Court to set aside a verdict because the judges of this Court, from the evidence as it is written down, would not have concurred in the verdict." *Gilmer case*, 42 W. Va. 52, 56, 57; *Hill's case*, 2 Grat. 594. Now, the *corpus delicti* is proven beyond question. It only remains to find whether the accused is excusable by way of self defense, or, if not excusable, what is the degree of his crime? Who will question that this is peculiarly a question for the jury dependant on the credit of witnesses and the weight of their evidence? *State* v. *Welch*, 36 W. Va. 690. It does appear to me that this Court has taken up scales and not only passed on the *credit* of witnesses, but undertaken to *weigh* their evidence with *nicety* just as a jury would. A circuit court can do this, but an appellate court cannot weigh evidence. *Norfolk* v. *Spencer*, 52 S. E. 310, pt. 8; 14 Ency. Pl. &. Prac. 770.

I dissent because I cannot consent to defeat and frustrate the administration of criminal justice by overruling verdicts approved by circuit courts after full and fair trial, when there is much evidence to sustain the verdict, simply because this Court thinks the jury and judge erred. My understanding is that where different men may form different conclusions upon the weight of a mass of evidence, especially if credit of witnesses is involved and the evidence is conflicting, an appellate court should not annull the trial. I venture to repeat, touching the force of verdicts, language in *State* v. *Bowyer*, 43 W. Va. 180. "The witnesses were face to face before the judge and jury. The prisoner was before them. They saw him in the ordeal of examination. They scrutinized his countenance, his demeanor, his words, his tone. They were to judge of his veracity. They discredited his denial of guilt. They saw and heard all the witnesses, all the circumstances

of the trial—often silent, but potential, evidence of the real truth. That judge and those jurors would average with us, had we been present, in capacity to judge of evidence; and as we have nothing of the actual appearance of the trial, and only the evidence in cold type, they are vastly more competent than we to pass safe judgment upon the facts. We are not a jury. We have power—mere power—to discredit verdicts, but we must be cautious in so doing.

Why have juries, if appellate judges are to go into the business of weighing evidence as if by the ounce and pound? We ought not to do this. It is an abuse of power, and a misconception of our functions and of the jury functions. The jury institution is sacred under our Constitution, and a verdict is to be highly respected. In long experience, I must say that, as a general thing, they evince good sense and do justice. From the frequency of requests to us to set aside verdicts, it seems to be thought that we can and will do so merely because we would not have found, judging from type, the same verdict; but such is not the rule, though instances deviating from these principles may be found, and I am very much averse to looseness in this matter on the part of appellate courts. And then, too, we must not forget that a learned and experienced judge approved the verdict, after witnessing the trial; and his opinion is entitled to great respect in an appellate court. *State* v. *Hunter*, 37 W. Va., 744, (17 S. E. 307). We must be careful lest we set ourselves up as judge and jury present at the trial, and usurp their functions." To same effect *State* v. *Morgan*, 35 W. Va. 260, 277. It is not merely for this case that I write this dissent, but it is to express dissent against a growing tendency to depart from volumes of decisions and treat lightly verdicts approved by trial courts and overthrow them on insufficient grounds. A verdict of twelve men, as competent to judge evidence as we, had we been present at the trial, confirmed by a judge, is overthrown by four men on evidence held as insufficient. Insufficient to prove what? Not the homicide. This is admitted. But to prove that the evidence is not sufficient to prove murder in the second degree, but only voluntary manslaughter, a matter dependent on evidence on which a jury is peculiarly fitted to judge and entitled by law to judge.

CHARLESTON

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BRUNER & MCCOACH *v.* MILLER.

Submitted January 23, 1906. Decided February 13, 1906.

1. COURTS OF EQUITY—*Rescission of Contracts—Mistake—Fraud.*
   Rescission of contracts, affecting any estate or interest in land, on the ground of fraud in the procurement thereof, or mutual mistake of the parties in effecting the same, belongs to the exclusive jurisdiction of courts of equity. (p. 44.)

2. RESCISSION OF CONTRACTS—*Remedy at Law.*
   Courts of law have jurisdiction and power to afford relief, in such cases by judgment for money or property, under some circumstances, when a right to rescind exists and has been properly claimed; but the remedy at law is incomplete and inadequate, because of lack of power to effect a rescission by a direct adjudication thereof. (p. 44.)

3. OIL AND GAS—*Oil Lease—Sale—Rescission.*
   Owing to the peculiar nature of oil and gas, both the quantity and location of land covered by a lease thereof for oil and gas purposes, are elements going to the substance and essence of a contract of sale of such lease, obligating the vendee to develop the property by drilling a well thereon and deliver to the vendor part of the product thereof, free of cost or expense; and a gross misrepresentation, as to either, relied upon by the vendee, under the belief that it is true, is ground for rescission of the contract. (p. 39.)

4. RESCISSION OF CONTRACT—*Decree.*
   On rescinding a contract, the court should, by its decree, put the parties in *statu quo*, by requiring each to restore to the other what he obtained by virtue of the contract. (p. 41.)

5. RESCISSION of CONTRACT—*Recovery of Consideration.*
   Money paid, as rental to the land owner, for delay in drilling a well under a lease, held by assignment, in accordance with the terms of the lease, may be recovered back on rescission, when the contract of sale does not bind the vendee to drill, but extends to him the right to pay such rental in lieu of drilling. (p. 41.)

(BRANNON, JUDGE, absent.)

Appeal from Circuit Court, Tyler County.

Bill by A. Bruner and others against R. W. Miller. Decree for plaintiffs, and defendant appeals.

Affirmed.

THOS. P. JACOBS, for appellant.

HALL & HALL, for appellees.

POFFENBARGER, JUDGE:

R. W. Miller has appealed from a decree of the circuit court of Tyler county, canceling a contract executed between him, as party of the first part, and A. Bruner and James McCoach, as parties of the second part, whereby Miller assigned and made over to said Bruner and McCoach a lease of certain lands of Nelson Myers for oil and gas purposes, Bruner and McCoach binding themselves, in the contract of assignment, to develop the property in accordance with the terms of the lease. The considerations paid by them to Miller were six hundred dollars in cash and an agreement that he should have a one-fourth interest in the first oil well drilled on the property, free of any cost or expense to him. The bill sought rescission of the contract and repayment of said sum of six hundred dollars, together with an additional $215.00, paid by Bruner and McCoach as rental for delay in drilling, on the ground of fraudulent representations on the part of Miller, as to the location and quantity of the property on which the lease was. It does not appear that any of the parties were very familiar with the land. Miller resided in the city of Wheeling and Bruner and McCoach in the city of Sistersville, Tyler county, while the land was situated in Wetzel county. For a number of years, James Lane of Wheeling had held part of the Myers land under lease, and he having died, Miller became executor of his will. As such executor, he and the devisees or heirs of Lane allowed it to lapse, believing it not to be of any value. In view of development in the neighborhood of the land, Miller obtained a lease of it himself, with a view to disposing of it to one Jennings. He first went to Myers and obtained a sort of option for which he paid six hundred dollars. Bruner and McCoach having been informed of this, made to him the proposition, with reference to the lease, afterwards embodied in the contract or deed in question here.

The lease from Myers to Miller is indefinite and uncertain as to the description and quantity of the land, no quantity being stated, except in that part which relates to the boundaries, reading as follows: "On the North by the lands of W. M. Wyatt; On the East by the lands of James Ice; On the South by the lands of John Mills; On the West by the lands of N. Myers, containing 215 Two hundred and fifteen acres

more or less." In discussing the merits of the property, in the negotiations for the assignment of the lease, the parties had before them certain plats of the lands mentioned in the lease and adjoining lands, and, on reading the lease in connection with these plats, the description and the plats did not correspond in respect to the names of the owners of adjacent lands. The plat was prepared upon information afforded by the lease and knowledge of the parties, and especially information communicated by Miller. This plat showed a tract of 215 acres designated as Nelson Myers No. 1. Then the deed of assignment was prepared describing the land as follows: "Containing 215 acres more or less and bounded and described as follows: On the North by the lands of William M. Wyatt, On the East by the lands of James Ice, On the South by the lands of John Mills, On the West by the lands of N. Myers and others; a plat of which said leasehold and surrounding territory is hereto attached marked in red ink 'R.W.M' and the leasehold above described or intended so to be, and the leasehold that is sold by this indenture is marked on said plat in red ink 'Nelson Myers No. 1.'" The plat was annexed to the deed of assignment. These deeds bore date, respectively, on the 13th and 14th days of February, 1900. The lease required the commencement of drilling within forty days from its execution, or in lieu thereof, payment thereafter to Myers of the sum of $215.00. It further required the completion of a well on the premises within six months from the date of the contract, or payment of a rental of one dollar per acre. These obligations Bruner and McCoach assumed in the deed of assignment. In view of the bad condition of the weather and roads, they failed to commence drilling within forty days, and paid said sum of $215.00. On examining the property, sometime in April, 1900, they found that all of the property described in the plat annexed to the deed except twenty-five or thirty acres was covered by a lease held by the South Penn Oil Company, under which said company was then operating. The clause in the lease, saying the land was bounded "On the West by the lands of N. Myers and others containing 215 Two hundred and fifteen acres more or less," plainly appears now not to have been a statement of the quantity of the land in the lease given to Miller, but the quantity of land belonging to Myers included in the

South Penn Oil Company's lease, adjoining and bounding the Miller lease on the west. Upon a proper construction of that lease, in view of the facts then existing, some of which were not known to the parties, the lease from Myers to Miller stated no quantity. It described the lands by boundary only. Under a misapprehension in this respect, the deed of assignment was made to call for a specific quantity, 215 acres, and to cover land not included in the lease. Under it Miller no doubt held a considerable quantity of land, possibly as much as 215 acres, and his right in it passed by the deed of assignment, but it was not the same land, a leasehold in which his deed of assignment purported to pass, nor is it located where said deed of assignment represents it to be.

In a contract of this kind, both quantity and location are material. It imposed upon Bruner and McCoach the duty of drilling a well for oil at an expense of eight or ten thousand dollars, partly for the benefit of Miller. Such a well is valuable not only for its actual product, but as a revelation or disclosure of the mineral value of the territory on which the well is. If the territory be of no greater extent than to justify the drilling of a single well, the obligation to pay over one-fourth of its product would be equivalent to one-fourth of the value of the territory; but if the territory is sufficient to require, or justify, the drilling of ten wells, one-fourth of the product of the first one would be of slight relative value. The testimony shows that some tests had been made in the community in which the land lies, some of which had disclosed the presence of oil while others had not. These tests indicated the value, for oil purposes, of the land lying near the wells. A lease on property, near a producing well, is valuable, while one on property lying in close proximity to a "dry hole" is considered worthless. Hence, in contracts of this kind, the location is peculiarly material.

A misrepresentation concerning the subject matter of a contract, and especially a contract relating to land, though innocently made, as a result of lack of knowledge, amounts in law to fraud, not actual, but constructive, legal fraud, and gives as complete a right of rescission as if it were actual fraud, subject, however, to the limitation or qualification that the representation must relate to some matter or thing which is of the very essence or substance of the contract. *Crislip*

v. *Cain*, 19 W. Va. 438; *Newman* v. *Kay*, 57 W. Va. 98, (49 S.E. 926). Ordinarily, a deficiency or an excess in the quantity of land sold or leased is not deemed to be a matter of substance. *Newman* v. *Kay*, cited; *Tucker* v. *Cocke*, 2 Rand. 51. But a misrepresentation and mutual mistake or a fraud on the one side, accompanied by ignorance on the other, resulting in a sale of property having a different location from that which the purchaser supposed it to have, will always afford ground of relief in equity. The identity of the property or thing sold is always a matter of substance. If, as to it, there is a mistake or one of the parties has been mislead by the fraud of the other, the purchaser is not deemed to have gotten the thing he bought. *Fearon Lumber Co.* v. *Wilson*, 51 W. Va. 30; *Chamberlaine* v. *Marsh*, 6 Munf. 284; *Graham* v. *Hendren*, 5 Munf. 185; *Glassell* v. *Thomas*, 3 Leigh 113. Under these principles, if Miller be absolved from the charge of fraud and the case regarded as one of mutual mistake, the right to relief is equally as clear as if there had been a fraudulent representation. The bill sets out the facts, showing the erroneous belief of the plaintiffs as to the location of the land, and prays a cancellation thereof. It shows that the purchasers did not get what they supposed they were buying. Hence, according to its allegations, there was either a mutual mistake or a fraud on the part of the defendant, actual or constructive, and the allegations of the bill are fully sustained by the evidence.

The evidence shows that, immediately upon a discovery of the misrepresentation or mistake and failure of title, the appellees made a demand upon Miller to take back the lease and refund the money paid by them to him as purchase money for the lease and to Myers as rental. Miller was willing to repay the six hundred dollars and relieve them from their contract, but unwilling to pay said sum of $215.00. It is not pretended that he would have been materially injured or prejudiced, aside from the loss of the benefit of his contract, had he accepted a re-assignment of the lease and paid back the money. The lease was still alive and no considerable period of time had elapsed. The offer to rescind was made not later than May 3, 1900, and this suit was commenced on the 18th day of July, 1900. The refusal to pay the rental was based upon the theory that its payment to Myers was occasioned by

the fault of the appellees themselves, they having agreed to comply with the terms of the lease, one of which was to pay said rental if the drilling of the well should not be commenced within forty days from the date of the lease. But there was no covenant requiring them to commence the well within forty days and thus avoid the payment of rental. They were allowed in the deed of assignment the full option in respect to this matter, accorded by the lease. They agreed to drill the well, but the covenant contained the following provision: "Such drilling to be done at such time or times as is most convenient to said parties of the second part, but any and all rentals accruing upon said leasehold under and by virtue of the terms of said lease shall be paid for and borne by said parties of the second part in proportion as above stated." Money paid as rental in consequence of delay in drilling was money paid out and expended under the contract and in reference to the property. It was contemplated and provided for by the deed of assignment. It was paid before the appellees had knowledge of the fraud or mistake, and was, therefore, an expenditure resulting directly from a misrepresentation of the appellant. The payment inured to the benefit of Miller, for had they not paid it, he would have been bound to do so. Had they spent one thousand dollars in drilling instead of paying the rent, before discovery of the fraud, would they not have been entitled to be placed in *statu quo*? Rescission goes to the whole transaction and places the parties in their former positions, when that can be done. We think it clear that the appellees were entitled to have refunded to them upon rescission all they had paid out under the contract. Whatever loss the appellant may have sustained, therefore, by reason of the failure to develop the property was occasioned by his own refusal to rescind the contract, upon the demand of the appellees and their offer to restore the lease to him. He might then have protected himself fully by developing the property or selling the lease to some other person. A subsequent sale of it would no doubt have been less advantageous to him than the one he had made to the appellees, but that was a misfortune of his own, for which they were in no way to blame. It was his lease. He had acquired it, and, from the consequences of his own negligence or oversight in procuring it, he could not relieve against him-

self by laying them upon the shoulders of other persons. Having refused to rescind when the appellees demanded it of him, in the exercise of their clear right to do so, it does not lie in his mouth now to say they have injured him either by refusing to develop the property or preventing him from doing so. They held on to the lease because he refused to take it back and pay them the money to which they were entitled. He contested their right to rescind at his peril and they were under no obligation to prevent or minimize damages resulting from his act, and which it was his own duty, and in his power, to prevent. Appellees were not in possession of the leasehold. They had expressly notified him of their intention not to drill or otherwise develop it. He could have entered upon and developed it, and, at the same time, prosecuted an action for the vindication of any rights he had under the contract.

Want of jurisdiction in equity is, however, the proposition mainly relied upon as ground for reversal, and the argument made to sustain it is, that an action at law for recovery of the money paid is an adequate remedy. In this connection many authorities are cited, including *Gall* v. *Bank*, 50 W. Va. 597, and *Ellis* v. *Amick*, 53 W. Va. 421. The concrete cases disposed of by these two decisions are not in any respect similar to the one presented in this record. The former was a suit in equity to enjoin an action at law for the recovery of money on a common law bond, and to cancel the bond, on the ground that it had been satisfied, in a compromise, by payment of a smaller sum than was called for by it. Assuming that there is concurrent jurisdiction in courts of law and courts of equity for the relief of the obligor under such circumstances, the decision is right and in perfect accord with the authorities everywhere, because when there is concurrent jurisdiction, and the law court has acquired jurisdiction of the matter, equity will not ordinarily interfere, although it would have readily taken cognizance had its aid been first invoked. That is the ground of the decision of that case. The syllabus says where an action is pending on the law side of the circuit court, equity will not take jurisdiction. 24 Am. & Eng. Ency. Law 617; *Ins. Co.* v. *Bailey*, 13 Wall. 616; *Grand Chute* v. *Winegar*, 15 Wall. 373. The concurrent jurisdiction of equity is very broad. In many instances it gives exactly the same relief that may be had in a court of law, a mere decree for

money corresponding to a judgment at law for money; but there is some equitable ground in addition to the right to recover money. Pom. Eq. Jur. §§ 171 to 189, inclusive. In most instances of this kind of jurisdiction, the right to go into equity is lost by allowing the law court to assume jurisdiction first. *Id.* § 179. The case, therefore, is no authority for the proposition that equity will never take jurisdiction where there is a remedy at law. It does not deny the doctrine of concurrent jurisdiction. The legal remedy was entirely adequate for a judgment in favor of the defendant would have been absolutely conclusive. It could have been pleaded as an adjudication against any right to recover on the bond in any subsequent action. In the other case, *Ellis* v. *Amick*, the object was specific performance of an alleged contract, if that could be had, and, if not, then a rescission of the contract and recovery of money paid under it. What was relied upon as the contract was not a contract. It was an absolutely void paper, presenting no contract either to be enforced or rescinded. There was no element of contract in it. Of course there was no jurisdiction to undo a thing that had never been done. The only right the plaintiff had, if any, was a right of recovery of money from the defendant, a right purely legal and absolutely devoid of any semblance of equitable right. The inapplicability of the other authorities cited is equally clear. Most of them were cases in which mere cancellation of void or voidable obligations was sought. Cancellation is not always the equivalent of rescission. An obligation for the payment of money differs from a contract or covenant to do some collateral thing. A note or bond simply binds one of the parties to pay money to the other. If it is voidable or void for any reason, the mode of getting rid of it is mere cancellation. There is no condition precedent to be performed. A fraudulent or void deed, passing no title may be cancelled and thereby destroyed. Nothing is to be done by the party attacking it as a condition precedent to the relief asked. If a suit at law has been brought on a note or bond that is voidable, because fraudulently procured, there is no reason why equity should intervene. The result of that action will settle forever the question of liability. It is already in suit, wherefore there is no probability that it will be negotiated or used in any other way to harass or annoy.

Equity, by canceling it, could do no more than put an end to the question of liability on it. That, a court of law does by its judgment. In cases of deeds and other muniments of title, affecting the status of property, cancellation is the only adequate remedy, for no court of law can adjudge and order that deed be cancelled or set aside. It can only give a judgment for money or for property. In these cases, nothing is needed but cancellation.

This case belongs to neither of the two classes above mentioned. The contract involved is not an obligation to pay money and the appellees did not merely ask, by their bill, to be relieved from a voidable paper obliging them to pay money. They seek a recovery of money, against the very letter of the contract, and they ask that the contract be rescinded in order that they may have back the money which they have paid under it. They might have a recovery of that money in an action at law on allegations of fraud and deceit, but that would be only an action for damages for a wrong. They might also recover it as money had and received by the appellant to their use; but that would not obtain an adjudication of the rescission of the contract. A rescission can no more be adjudged in a court of law than a cancellation. Such adjudications are wholly foreign to the law courts and are peculiarly and exclusively equitable in their nature. Rescission may be enforced in a court of law, or rather there may be a recovery of money or property in a court of law as the result of a rescission made by the parties. 24 Am. & Eng. Ency. Law 643. In such case the plaintiff, before suit, tenders back to the defendant the money or property which he has received under the contract and then sues for what he has parted with, and his recovery is one of money or property as the case may be. The rescission is not by the adjudication of the court, but by the act of the party himself. He is not bound, however, to pursue this course, and it is not often done in the case of written contracts. He is entitled to an adjudication, a judicial determination, of the fact of rescission. That he can get only in a court of equity.

"A court of equity entertains a suit for the express purpose of procuring a contract or conveyance to be cancelled, and renders a decree conferring in terms that exact relief. A court of law entertains an action for the recovery of the pos-

session of chattels, or, under some circumstances, for the recovery of land, or for the recovery of damages, and although nothing is said concerning it, either in the pleadings or in the judgment, a contract or a conveyance, as the case may be, is virtually rescinded; the recovery is based upon the fact of such rescission, and could not have been granted unless the rescission had taken place. Here the remedy of cancellation is not expressly asked for, nor granted by the court of law, but all its effects are indirectly obtained in the legal action. It is true, the equitable remedy is much broader in its scope, and more complete in its relief; for its effects are not confined to the particular action, but by removing the obnoxious instrument they extend to all future claims and actions based upon it." Pom. Eq. Jur. § 110. Such cases belong to the exclusive jurisdiction of equity. *Id.* §§ 171–188; 24 Am. & Eng. Ency. Law, pp. 613 to 618, inclusive.

From the peculiar nature of the jurisdiction for the purpose of rescission, this Court has always recognized the right of a party who is the victim of a fraud or mistake to come into equity for relief, notwithstanding the existence of concurrent jurisdiction in the law courts. See *Kelly* v. *Riley*, 22 W. Va. 247; *Atkinson* v. *Beckett*, 34 W. Va. 584; *Pritchard* v. *Evans*, 31 W. Va. 137; *Nichols* v. *Cooper*, 2 W. Va. 347; *Anderson* v. *Snyder*, 21 W. Va. 632; *Crislip* v. *Cain*, 19 W. Va. 438; *Boggs* v. *Harper*, 45 W. Va. 554; *Newberger* v. *Wells*, 51 W. Va. 624; *Newman* v. *Kay*, 57 W. Va. 98, (49 S.E. 926). Jurisdiction in equity was asserted in *Fearon Lumber Co.* v. *Wilson*, 51 W. Va. 30, a case almost the exact parallel of this case. A purchaser of real estate was permitted, by way of rescission, to recover back in equity the purchase money paid for the land. The principles upon which the foregoing decisions of this Court rest are almost universally recognized by the authorities. *Taymon* v. *Mitchell*, 1 Johns. (Md.) 496; *Higgins* v. *Crouse*, 63 Hun. (N. Y.) 134; *Bruner* v. *Meigs*, 64 N. Y. 506; *Crump* v. *Ingersoll*, 44 Minn. 84; *Crump* v. *Ingersoll*, 47 Minn. 179; *Bosley* v. *National Machine Co.*, 123 N. Y. 550; *Cocke* v. *Hardin*, 5 Litt. (16 Ky.) 374; *Mayne* v. *Friswold*, 3 Sandf. (N. Y.) 463; *Relf* v. *Eberly*, 23 Ia. 467; *Hosleton* v. *Dickinson*, 51 Ia. 244; *Davis* v. *Peabody*, 170 Mass. 397; *Caldwell* v. *Caldwell*, 1 Marsh. (Ky.) 53.

The decree of the circuit court, however, has departed from the case made by the bill and the evidence, in cancelling the deed of assignment. By that deed, the appellant passed, to the appellees, title to the lease. As a condition of receiving back their money they should have conveyed the lease back to him. As hereinbefore shown, the case is not one of mere cancellation. There was something to be done on both sides. The lease was to be restored to Miller and the money to Bruner and McCoach. The decree requires Miller to pay back the money without requiring Bruner and McCoach to restore the lease. It may be of no value, by reason of its having expired, but neither its validity nor its status appears from this record. This Court cannot say whether it is still alive, nor was the court below in a position to do that. But as no objection to the decree is made on this ground, and this Court cannot see that the appellant has been prejudiced in this respect, it cannot be reversed on a mere presumption of error. The presumption is the other way.

For the foregoing reasons, the decree appealed from will be affirmed, with costs and damages to appellees according to law.

Affirmed.

CHARLESTON

LOVERIN & BROWNE COMPANY *v.* BUMGARNER.

Submitted January 11, 1906. Decided February 13, 1906.

1. GUARANTY—*Construction—Action against Guarantor.*

The following written guaranty made by J. H. B. to L. & B. Co. for the benefit of his infant son H. B. viz: "For the purpose of enabling H. Bumgarner to purchase goods upon credit from Loverin & Browne Co., of Chicago, I hereby guarantee that said H. Bumgarner shall promptly pay them for all goods which they may hereafter sell to him upon credit until this guarantee is revoked. Said payment to be made within ten (10) days after receiving goods, my liability hereinunder shall cover any balance to become due not exceeding Five Hundred Dollars. Goods ordered under this Guarantee

may be returned within ten days after receiving same at invoice price if goods are returned in good order properly packed. Dated, Elizabeth, W. Va., July 11th, 1903. J. H. Bumgarner. (Seal)." *Held:* to be a guaranty of payment absolute and unconditional, upon which a suit may be commenced against the guarantor without any previous suit against the principal. (p. 54.)

2. GUARANTY—*Time of Payment—Breach.*
When the terms of a guaranty of payment fix the time within which the payment shall be made, if the payment is not made within the time prescribed there is a breach of the guaranty and no steps need be taken against the principal, nor need his insolvency be shown in order to charge the guarantor. (p. 52.)

3. EVIDENCE—*Letters—Genuineness.*
The genuineness of a letter is sufficiently established to permit its introduction in evidence when it is shown that it was received in due course of mail in response to a letter sent to the supposed writer. (p. 61.)

4. EVIDENCE—*Letters, Copy of.*
And, upon notice having been given to such writer to produce the original of the letter to which his was a reply and his failure to produce such original, a letter press copy thereof is admissible in evidence. (p. 61.)

5. EVIDENCE—*Harmless Error.*
The admission of incompetent evidence over objection will not reverse a judgment when it is clear that such error could have worked no prejudice to the exceptor. (p. 63.)

6. SYLLABUS APPROVED—*Pleading—Denial—Affidavit.*
Syllabus point 4, *Dix* v. *Robinson*, 18 W. Va. 528, and point 1 syllabus, *Maxwell* v. *Burbridge*, 44 W. Va. 248, approved. (p. 64.)

Error to Circuit Court, Wirt County.

Action by the Loverin & Browne Company against J. H. Bumgarner. Judgment for plaintiff, and defendant brings error.

Affirmed.

T. A. BROWN and D. C. CASTO, JR., for plaintiff in error.

F. T. LOCKHART and W. N. MILLER, for defendant in error.

MCWHORTER, PRESIDENT:

This is an action of *assumpsit* brought by the Loverin & Browne Co., a corporation, against J. H. Bumgarner in the circuit court of Wirt county upon two guaranties in writing, the first in the following words:

"For the purpose of enabling H. Bumgarner to purchase

goods upon credit from Loverin & Browne Co., of Chicago, I hereby guarantee that said H. Bumgarner shall promptly pay them for all goods which they may hereafter sell to him upon credit until this guarantee is revoked. Said payment to be made within ten (10) days after receiving goods, my liability hereinunder shall cover any balance to become due not exceeding Five Hundred Dollars. Goods ordered under this Guarantee may be returned within 10 days after receiving same at invoice price if goods are returned in good order properly packed. Dated, Elizabeth, W. Va. July 11th, 1903. Signed, J. H. Bumgarner, (Seal)."

The second, without date, but made in August as appears from the record, is in addition to the former, and is as follows: "For the purpose of enabling Harry Bumgarner to purchase goods upon credit from Loverin & Browne Co., of Chicago, we or I hereby guarantee that said Harry Bumgarner shall promptly pay them for all goods which they may hereafter sell to him upon credit until this guarantee is revoked. Said payment to be made within 10 days after receiving goods, we or my liability hereinunder shall cover any balance to become due not exceeding One Thousand Dollars. Goods ordered under this guarantee may be returned within 10 days after receiving same at *invoice* prices if freight charges are paid and goods returned in good order properly packed. Signed, J. H. Bumgarner, (Seal)."

Plaintiff filed with its declaration a bill of particulars showing that it had sold in all under said guaranties to Harry Bumgarner goods to the amount of $2,001.97 and had been paid by said Bumgarner $1,312.46, leaving a balance due as claimed of $681.51, which bill of particulars was duly sworn to and the defendant notified that the plaintiff would rely upon the said stated account as its bill of particulars upon the trial of the action.

The defendant filed his counter affidavit that he believed there was no sum due from him to the plaintiff upon said demands stated in plaintiff's declaration and entered his plea of *non-assumpsit*. The defendant also tendered his special plea that the plaintiff ought not to have or maintain his said action against him, because he says that the contract which the plaintiff was seeking to enforce against him was one in which the defendant was a guarantor for Harry Bumgarner who

was the alleged principal; that said Harry Bumgarner was the principal in said contracts and that defendant was only guarantor for said principal; that at the time of the making of said contracts and promises and undertakings the said Harry Bumgarner was an infant under the age of twenty-one years, and that for further plea defendant says that the several bills and articles of goods, wares and merchandise mentioned in plaintiff's declaration alleged to have been sold and delivered to said Harry Bumgarner, he, the said Harry Bumgarner, was an infant and that said goods, wares and merchandise were not necessaries for the said infant. Plaintiff took issue upon said plea and at the October term, 1904, of said court plaintiff by leave of court withdrew its reply to the special plea filed and moved the court to strike out said special plea, which motion was sustained and the said special plea stricken out, to which ruling the defendant objected and excepted. The defendant then tendered a second special plea, which was filed over the objections of the plaintiff, to which ruling plaintiff excepted. Said special plea was to the effect that the contract upon which the plaintiff's action was based was a contract of guaranty that Harry Bumgarner, the principal, should be first required to pay the same and that plaintiff should have exhausted its remedy against him before looking to the guarantor; that plaintiff had been negligent in not pursuing its remedy against Harry Bumgarner and that Harry Bumgarner was solvent at the time of making the said accounts and at the time of the institution of the action against defendant, and that if Harry Bumgarner was insolvent he had become so since default made in the payment of the said claim, to which plea plaintiff replied generally.

On the 8th of February, 1905, a jury was sworn in the case and not being able to agree upon a verdict were discharged. On the 10th of May, 1905, another jury was empanelled and sworn, and after hearing all the evidence and the arguments of counsel and the instructions of the court returned a verdict for the plaintiff assessing the damages at $630.99. The defendant then moved the court to set aside the verdict and grant him a new trial on the ground that the verdict was contrary to the law and the evidence, which motion was overruled by the court and judgment entered upon said verdict.

In the progress of the trial the defendant took several bills of exceptions, which were signed, sealed and saved to the defendant. The case was brought to this Court upon writ of error and *supersedeas*.

The first cause of error assigned is in overruling the motion of defendant to set aside the verdict of the jury and grant him a new trial. This assignment will be disposed of in connection with other assignments hereinafter treated relative to the admission of testimony objected to by the defendant.

The second assignment is that the court erred in giving to the jury Instructions Nos. 1, 3, 4, 5 and 6 asked for by the plaintiff and set out in bill of exceptions No. 5; and the third assignment in refusing to give to the jury defendant's instruction No. 2 as set out in bill of exceptions No. 6. These instructions involve the character and effect of the two written guaranties made by the defendant J. H. Bumgarner and filed with the plaintiff's declaration. The plaintiff's instructions as set out in bill of exceptions No. 5 are to the effect that if the jury should believe from the evidence that the defendant signed and executed to the plaintiff the guarantee contracts sued upon and shown in evidence, and that upon the faith of such guarantees Harry Bumgarner or H. Bumgarner obtained the goods sued for from plaintiff and did not pay for some of the same within ten days thereafter as provided for in said contracts, then the defendant became at once liable to pay for the said goods up to the limit of his guarantee contracts and plaintiff was not bound to first pursue the principal before instituting this suit on said guarantee contracts and should find for the plaintiff the value of all such goods as they should find from the evidence had not been paid for by the principal within such limits. These instructions are given on the theory that the guaranties sued upon are unconditional guaranties for the payment of the money for Harry Bumgarner within ten days after the delivery of the goods to said Harry Bumgarner on the default or failure of the principal to pay the same. Harry Bumgarner was the infant son of the defendant, J. H. Bumgarner, who was anxious to start him in business and for that purpose made the guaranties sued upon in this case. The goods furnished to Harry Bumgarner under these guaranties were

not shipped to any place of business of the said Harry Bumgarner but were sold by him to his customers and put up in packages to fill the orders received by plaintiff from Harry Bumgarner and the goods shipped in packages convenient to be delivered, and consigned to the plaintiff itself at such places as would be most convenient for the delivery by the said Harry Bumgarner, and the bills of lading were sent endorsed over by the plaintiff to Harry Bumgarner and in a few instances endorsed by plaintiff over to defendant to be by him endorsed over to Harry Bumgarner to enable him to get the goods. The circumstances of this case clearly indicate that the defendant intended by his guaranty to be primarily liable for the goods so delivered to his son who was a mere boy, not competent under the law to contract or do business for himself, and it was evidently contemplated that the ten days after the receipt of the goods were given as time for Harry Bumgarner to deliver the goods and collect the money and make immediate payment thereof to the plaintiff less the profits to the said Harry Bumgarner. It is not reasonable to suppose that plaintiff would have knowingly entered into a business arrangement with an infant and furnished him goods to sell and collect the proceeds, and it take all the risk of being defeated in its collection of the price of the goods on his plea of infancy. The proposition is too unbusinesslike to be entertained for a moment and defendant, knowing this, fully intended that his guaranty should be absolute and unconditional and his correspondence with the plaintiff, at least such of it as was properly admitted as evidence at the trial, clearly shows his intention in the premises to that effect. It is shown that he furnished money to his son, Harry Bumgarner, on at least one occasion, a check for $400 to pay on his indebtedness to plaintiff, of which Harry paid to plaintiff only $300. In *Arents* v. *Commonwealth*, 18 Grat. 750, it is held that although in general the contract of a guarantor is to pay, if after due diligence the debt cannot be made out of the principal, yet the intention of the parties must govern, and if it was the guarantor's intention to make himself liable on the default of the principal debtor without the use of the ordinary means to compel payment by him or proof of his insolvency he will be held accordingly. That his contract in such a case is a guaranty of payment or of punctual payment

by the principal debtor and not merely a guaranty of solvency or of ultimate payment after the usual means of enforcing it are employed. In the 18th Grat. case cited above, Joynes, J. in delivering the opinion of the court at page 770, after discussing the differences between the contract of a guarantor and that of a surety, says: "But while this distinction exists, in general, between the contract of a surety and the contract of a guarantor, we must, in every case, look to the terms of the guaranty and to the circumstances under which it was made, to ascertain, by the rules of construction, the character and extent of the undertaking. If it thus appears to have been the intention of the guarantor to make himself liable on the default of the principal debtor, without the use of the ordinary means to compel payment by him, or proof of his insolvency, he will be held liable accordingly. His contract, in such a case, is a guaranty of payment, or of punctual payment, by the principal debtor, and not merely a guaranty of solvency, or of ultimate payment, after the usual means of enforcing it are employed." See also *Douglas* v. *Reynolds*, 32 U. S. (7 Pet.) 113, at page 126. In *City of Memphis* v. *Brown*, 20 Wall. 289, the contracts there under consideration contained a provision as follows: "The City of Memphis will and does hereby guaranty to the contractor the payment of said accounts as so assessed against the property owner, or owners for the pavement according to the plans and specifications." The opinion of the court at page 311 referring to this provision says: "It will be perceived that this is a a guarantee of payment and not of collection merely, and upon which, upon general principles of law, a suit may be commenced againt the guarantor without any previous suit against the principal." Citing *Railroad Company* v. *Howard*, 7 Wall. 407; *Zabriskie* v. *Railroad Company*, 23 How. 381; *Leggett* v. *Raymond*, 6 Hill 641. In *Campbell* v. *Baker*, 46 Pa. St. 243, it is held: "A guaranty of the payment of a note 'when due,' is broken by non-payment at maturity: and the guarantor is then liable upon his contract to the creditor, who is not bound either to pursue the principal or show his insolvency." And so in *Roberts* v. *Riddle*, 79 Pa. St. 468: "A guaranty of the payment of a written obligation 'according to its terms' is broken by non-payment when

the time for payment arrives, and the guarantor is liable without pursuing the debtor to insolvency."

The defendant to maintain his proposition that the guaranties sued upon were the ordinary collateral and secondary guaranties of payment, only after plaintiff's remedy against the principal should be exhausted, relies upon the case of *Building & Loan Association* v. *Engle*, 45 W. Va. 588, and *Kearns* v. *Montgomery*, 4 W. Va. 29. In the 45th W. Va. case the guaranty was upon a loan of $800 from the Loan Association to Frank Engle to secure which Engle had executed a mortgage on certain property and had given bond, and the guaranty was, "the payment of said sum of eight hundred dollars by the said Engle to the said company, on the terms and in the manner set out in said bond and mortgage." The bond and mortgage were according to the forms and terms peculiar to building and loan association contracts and the guaranty could only mean that in case the mortgaged property failed to pay the debt, in case it had to be resorted to, and further that the bond of Engle should prove insufficient, to supplement it by the payment of any balance remaining unpaid after exhausting the mortgaged property, the guarantors would then be liable, their guaranty not being for the payment of money absolutely at or within a specified time, but "on the terms and in the manner set out in said bond and mortgage," so that it was clearly the intention of the parties that they should exhaust not only the mortgage but pursue the bond, when the guarantors would be liable for any deficiency after the mortgage and bond were proven insufficient. In case of *Kearns* v. *Montgomery*, as stated by the Court at page 40, "Whether the defendant is guarantor or maker, depends on the understanding of the parties. * * * * * * * if a stranger endorse his name in blank on the back of paper not negotiable, he is *prima facie* guarantor, but this presumption may be rebutted by showing the original understanding of the parties, by showing an express agreement otherwise, or by showing circumstances from which one may be inferred." Brandt on Suretyship, section 116, page 256, says: "When the terms of a guaranty of payment fix the time within which the payment shall be made, if the payment is not made within the time prescribed there is a breach of the guaranty, and no steps need be taken against the princi-

pal, nor need his insolvency be shown in order to charge the guarantor."—And cases there cited. In *Tobacco Company* v. *Heid*, 62 Fed. Rep. 962, the court quotes with approval from Rand. Com. Paper, section 850, where it is said: "A guaranty may be absolute or conditional. One who guaranties payment becomes absolutely liable on any default of payment by his principal." In *Moore* v. *Holt*, 10 Grat. 284, it is said at page 294: "But as a guaranty is regarded as a mercantile instrument, it is not to be interpreted by any strict technical rules of construction, but by what may be fairly presumed to have been the intention and understanding of the parties." Citing *Douglas* v. *Reynolds*, 7 Pet. 113; *Bell* v. *Bruen*, 1 How. 169; *Lee* v. *Dick*, 10 Pet. 482. Stearn's Suretyship, section 61: "If the liability of the promisor is fixed by the mere default of the principal it is an absolute guaranty, but if the promisor's liability depends upon any other event than the non-performance of the principal it is a conditional guaranty. * * * * * * It is not necessary to first pursue and exhaust the principal before proceeding against the guarantor in cases where the guaranty is absolute." See also 25 Cent. Dig. 191, section 89.

It seems unnecessary to cite further authorities upon this proposition. That the defendant's guaranties in this case are absolute and unconditional, from the circumstances of the case and the authorities, is unquestionable. This being so, the instructions asked by the plaintiff and given by the court were properly given; and, because this is so and the instruction asked for by the defendant and refused by the court, being based upon the opposite theory that the guaranties were conditional and required the principal to be pursued to insolvency, the same was properly refused.

Bills of exceptions Nos. 1, 2 and 3 go to the rulings of the court in admitting certain testimony over the objection of the defendant. The first objection is an objection to the reading of the deposition of Arthur Coon taken in Chicago on the 5th day of April, 1905, first, because of the insufficiency of the notice and the service thereof. The notice seems to be very full as to when and where the same should be taken and ample time given, the notice was served by a deputy sheriff of Wirt county by delivering a copy of the same "into the hands of J. H. Bumgarner in Wirt County, W. Va., March 20th,

1905." It is further objected to because it is not properly certified. The objector points out no deficiency in the certification and it appears to be sufficient. A third general objection is "because the notice shows that the deposition taken under it shows that the same were to be read on behalf of the witness and not on behalf of the plaintiff." It is only necessary in reply to this objection to say that the notice shows no such thing, but says the depositions to be taken are "to be read in evidence in my behalf in the trial of a certain action at law now pending in the circuit court of Wirt county, State of West Virginia, in which action the undersigned is plaintiff and you are defendant." This notice was addressed to J. H. Bumgarner and signed by Loverin & Browne Co., plaintiff, by counsel. Upon the introduction and reading of the depositions of Arthur Coon at the trial we have a labyrinth of objections and exceptions being almost without number. The plaintiff undertook to prove by the witness, Arthur Coon, the written correspondence between the plaintiff and the defendant as well as that between the plaintiff and Harry Bumgarner concerning the shipment and delivery of goods and the receipt of orders for same, and enclosing bills of lading which were always made to plaintiff consignee, and either endorsed over to Harry Bumgarner to enable him to receive the goods shipped, or endorsed over to defendant to be by him endorsed over to Harry Bumgarner. Some of these exceptions are well taken because they fail to show with particularity the enclosing of letters in envelopes and stamping them and placing the same in the post office, but content themselves with such proof as the following as a sample: the witness testified that "On the 31st day of August, 1903, Loverin & Browne Company sent a letter to Harry Bumgarner enclosing a statement of his account showing a balance due to Loverin & Browne Company of $468.94 and asking him to remit" &c., without saying how the letter was sent, whether by mail, private messenger or otherwise, and then offer the letter press copies of such letters as secondary evidence, the original letters not being in possession of the plaintiff, or under its control. In most of such cases on such objections the letter itself was permitted to go in evidence and so much of the witness' testimony as related to the contents of the letter was stricken out. On the 25th day of November, 1904, the

plaintiff caused to be served on the defendant a notice, dated October 24th, 1904, to produce on the trial of said action certain letters written to the defendant by the plaintiff in relation to the matters here in controversy, giving the dates thereof and notifying him that upon his failure to produce such letters it would offer secondary evidence of the contents thereof. On the 23rd of September, 1903, plaintiff wrote a letter to defendant notifying him of the balance due on account of Harry Bumgarner to that date $684.32, that there would be a credit on such balance of about $40, on account of goods returned as soon as they were in, and informing him that they had written Harry Bumgarner several times requesting him to keep his account paid up to date but he seemed to be getting behind, which was the reason of this notice, and asked defendant to take up the matter with him and have him settle the matter as soon as possible, as they could not have the matter run so long. October 6th, 1903, the plaintiff received from J. H. Bumgarner a letter requesting a statement of Harry Bumgarner's account, which letter witness stated was mislaid and plaintiff was unable to produce the same on trial, at any rate on the same day, October 6th, plaintiff wrote a letter to defendant replying to said request enclosing statement of Harry Bumgarner's account showing balance then due plaintiff of $890.37, called his attention to the fact that they had repeatedly requested Harry Bumgarner to settle this account but that he had kept putting it off from time to time and that the account ought to be all settled by that time "with the exception of the last shipment, which we presume has not yet been delivered." And informing him that a credit would go on the account of about $60 or $70 for merchandise that was not yet in, and asking him to take up the matter at once and arrange for an immediate settlement. On the 8th of October, 1903, plaintiff received a letter from J. H. Bumgarner, dated October 7th, in which he says, "I wrote you about a week ago for a statement of Harry Bumgarner a-c with you, as he is my son and I am on his bond I think it *justis* to me to have a full statement of all the Business he has *don*, the total amount of goods shipped to him & also the Commission he would be entitled to." On the same day, the 8th of October, plaintiff wrote defendant that it had mailed him statements on the 7th and presumed that he

had received them by that time, stating that the amount of shipments itemized in those statements was simply the net cost of the goods shipped and was the balance due the plaintiff, that it had nothing to do with the commission. Witness stated that on October 15th plaintiff wrote to defendant that it had received $300 from Harry Bumgarner since sending statement to J. H. Bumgarner, which had been credited to his account. On the same day, October 15th, J. H. Bumgarner wrote plaintiff enclosing freight bill of $2.25 for which he asked plaintiff to give his son Gay Bumgarner credit, and says, "I don't want my boys to owe anybody when it ought to be paid but they have sold a good many goods but it seems they come out behind at every shipment and I have to make up the deficiency." Then in a postscript he adds "Please let me know at once how Harry Bumgarner stands with his a-c. I sent him a check for $400 that he said he had fell behind and that he could square up with that amount." On the 19th day of October plaintiff received from defendant a letter dated October 17th, 1903, as follows:

"Elizabeth, W. Va., Oct. 17, 1903. Loverin Browne Co. Dear Sirs:—I rec. your letter stating that Harry Bumgarner had sent $300 to be credited on his a-c, when I had sent him my check for $400, which was to be sent to you. It does seem to me that he either spends all the money he gets for goods or keeps it & if he is not reducing his a-c I don't want you to send him any more goods on my a-c so send me a statement of all the money he has ever sent you since he commenced business with you & in the mean time don't send him any more goods on my Bond *untill* you hear from me."

This letter is in answer to the letter of plaintiff informing him of the receipt of $300 from Harry Bumgarner. It will be seen that in the postscript of defendant's letter of October 15th he had mentioned sending a check to Harry Bumgarner for $400, when he finds that he had paid over to plaintiff only $300 of the $400 sent to him by the defendant he is inclined to not further guaranty payment for him. Witness stated that on the 20th of October, 1903, plaintiff wrote a letter to defendant in reply to his letter of October 15th enclosing the freight bill for $2.25 and his letter of October 17th countermanding his guaranty of Harry Bumgarner, which would take effect of that date and enclosing statement

of account showing balance due of $737.90, that a little shipment of $9.76 was made on that day before his countermand was received, that the bill of lading was mailed to Harry Bumgarner and charged to his account. This letter goes on to reply to defendant's letter in relation to the business of his sons when he says, "they have sold a good many goods but it seems as though they come out behind on every shipment and I have to make up the deficiency," and states that that was not any fault of the business they were in but as they learned on good authority it was the fault of the disbursement of the funds they received, and expressed a regret that his sons had not been careful about their habits; that they would be very sorry to close their business relation with defendant and his sons but would not advise that it be continued in the manner it was then done. On the 22nd of October plaintiff wrote to defendant that it had received a check from Harry Bumgarner for $313.76, which it had credited together with $20.40 on account of freight, also $32 for goods returned from Nelsonville, to the introduction of which last named letter no objection was made. On the 26th day of October plaintiff wrote to J. H. Bumgarner that it had received an order from Harry Bumgarner for delivery October 30th at Nelsonville, Ohio, amounting to $375, stating that it would ship the goods to its order and hold the bill of lading until it should hear from defendant, and ask whether it should send the bill of lading to Harry Bumgarner for the shipment and charge same under the guaranty given by defendant for his account and asking for a reply at once. In reply to this letter on the 30th of October, plaintiff received from defendant the following letter dated October 28th:

"Your letter of the 26th Rec. & in reply—Well you can let Harry Bumgarner have the goods shipped to Nelsonville, $375, on my bond and in the mean time urge him to send his collections as fast as he can. I want to do all I can for the boys, but don't want him to get *to* far behind, there is one thing about Harry, he is *thorley* honest, but he let a lot of his workers get away with him & has been reckless with his money, but has lots of business about him & any advice you will give him to hold him down will be highly *apreciated* by me."

Upon receipt of said letter plaintiff mailed the bill of lad-

ing and invoice to Harry Bumgarner at Nelsonville, Ohio. On the 6th day of November plaintiff wrote defendant enclosing to him bill of lading for shipment consigned to plaintiff at Buchtel, Ohio, amounting to $23.15, for Harry Bumgarner, informing him that M. C. Clarke was there and stated that it was his understanding and Harry Bumgarner's that defendant would stand good for future shipments to Harry Bumgarner but that plaintiff did not understand it that way as defendant only instructed it to turn over the Murray City shipment and the Nelsonville shipment which it had done, and asked whether he would stand good for future shipments to Harry Bumgarner up to the amount of his guaranty and ask for a definite reply so there would be no delay in mailing the bill of lading to Harry Bumgarner; and if it was his intention to stand good for future shipments to please endorse the enclosed bill of lading over to Harry Bumgarner and mail to him at Nelsonville so that he could get the goods and would charge to his account. Witness stated that on November 9th, plaintiff made a shipment to Harry Bumgarner to Glouster, Ohio, for $58.52, invoice of shipment mailed to Harry Bumgarner at Glouster and bill of lading was endorsed over to J. H. Bumgarner and mailed to him at Elizabeth, W. Va., and asking defendant to endorse the bill of lading over to Harry Bumgarner and mail to him at Glouster in case he wished to have the goods charged to him under his guaranty, and enquiring of him about the bill of lading mailed to him a few days before for the same purpose. By letter dated November 9th, 1903, to plaintiff, defendant acknowledged the receipt of this letter of November 6th and "in reply will say I want to — what is best to help Harry Bumgarner and am willing to stand on his bond for $800, which I think is best for all parties concerned and will mail him the bill of *laden* for $23.13 and you can let him have the goods. Please let me know how his a-c stands and oblige."

On the 13th of November plaintiff wrote defendant, among other things as follows: "We have your letter of Nov. 9th and note what you say about standing good for future shipments made to Harry Bumgarner to the amount of $800.00 and we will be governed accordingly. We enclose statement of his account to date, showing balance due $859.72. This will be reduced somewhat by goods returned. We have also

sent him statement, requesting him to arrange to settle without further delay, so that we can mail him bills of lading for future shipments."

On November 12th, defendant wrote plaintiff: "I just recd. a letter from Harry Bumgarner stating that Mr. Clarke would make the orders for goods in the future and he would work for him and that he would not want to ship any more goods on my bond until further orders." On the 14th of November plaintiff wrote defendant: "We have your letter of November 12th, countermanding guaranty given for account of Harry Bumgarner, and we will not ship any more goods under your guarantee until further instructions from you. We wrote you yesterday, sending statement of balance due on his account, which we trust will be settled up as soon as possible." On the 10th of December, plaintiff wrote defendant: "As guarantor for the account of Harry Bumgarner, we hand you herewith statement of his account to date, showing balance due $689.51. This account has been running some time and as we do not see any prospects of getting it out of Harry Bumgarner we shall have to ask you to settle same. Kindly send us draft by return mail to balance, and oblige."

This is the amount of plaintiff's claim as shown by its bill of particulars filed with its declaration which is an itemized statement of all the shipments made to Harry Bumgarner as well as all payments made by him during the whole time of their dealings, showing goods shipped in all to amount of $2,001.97 and credits to the amount of $1,312.46, leaving balance due plaintiff said sum of $689.51, which account was proved by the deposition of Arthur Coon, bookkeeper of plaintiff, as true and correct and showing the true balance unpaid.

A notice hereinbefore mentioned given by plaintiff to defendant to produce certain letters written by plaintiff to defendant named specifically letters dated Sept. 23rd, Oct. 6th, Oct. 8th, Oct. 15th, Oct. 20th, Oct. 22nd, Oct. 26th, Nov. 6th, Nov. 9th, Nov. 13th, Nov. 14th, Dec. 10th, and Dec. 30th, 1903, respectively. The correspondence between plaintiff and defendant introduced in evidence with the deposition of Arthur Coon, shows the letters of defendant in reply to letters of plaintiff asking and receiving statements of account of his son, Harry Bumgarner, all the time acknowledging his

liability to plaintiff on his guaranties, usually calling it his bond, that he was on the bond for Harry. Carbon copies of these letters from plaintiff to defendant from its letter book became admissible as secondary evidence under the notice to defendant to produce the originals of such letters, taken together with replies thereto written by defendant which reply letters are admissible without proof of the hand writing. In 2 Whart. on Ev., sec. 1328, it is said a letter in answer to one written is presumed to be genuine. *Bank* v. *Geisthardt*, 75 N. W. 582: "The genuineness of a letter is sufficiently established to permit its introduction in evidence when it is shown that it was received in due and regular course of mail in response to a letter addressed to the supposed writer." In *Davis* v. *Robinson*, 67 Iowa 255, it is held: "Letters written with a typewriter and received by defendant through the mail and purporting to be answers to letters written by him to plaintiffs, were admissible in evidence against plaintiffs without further proof that they were written by them." And *Scofield* v. *Parlin*, 61 Fed. Rep. 804: "A letter received in due course of mail in response to a letter sent by the receiver is presumed, in the absence of any showing to the contrary, to be the letter of the person whose name is signed to it." 1 Greenleaf on Ev. 575 (c), and cases cited; 3 Wig. on Ev. p. 2893 (d); 1 Ell. on Ev. 107; *Cobbs* v. *Glenn Boom & Lumber Co.*, 49 S. E. 1005. In *Ovenston* v. *Wilson*, 2 Car. & Kir. 1, cited by 1 Greenleaf above, it is held that where a letter was written by the managing clerk of plaintiff's attorney to the defendant, a letter received in answer was admissible in evidence without proof of the defendant's handwriting; and it was also held that a letter proved to be received of an earlier date, in the same handwriting as the last mentioned letter, was likewise admissible; and also a copy of a letter written by the said clerk of plaintiff's attorney of a still earlier date, to which the last mentioned letter was an answer, was also given in evidence (the original not having been produced after a notice to produce) without any proof that the original had been put in the post, or had reached the defendant. *Boykin* v. *State*, 24 Sou. 141 (Fla.); *Plow Co.* v. *Munger*, 52 Kan. 371.

In defendant's letter of October 28th to plaintiff in reply to plaintiff's letter of two days before informing him that it

had an order from Harry Bumgarner for delivery of goods at Nelsonville, Ohio, amounting to $375, and that it would hold the bill of lading until it heard from defendant, he gave plaintiff explicit directions to ship them "on my bond and in the mean time urge him (Harry Bumgarner) to send his collections as fast as he can." Some two or three times defendant would temporarily suspend his guaranty, or his bond as he termed it, then would again authorize goods shipped to his son thereon. Plaintiff would sometimes send the bills of lading endorsed by it to defendant and by him to be endorsed over to Harry Bumgarner in case the defendant was willing to stand liable on his guaranty to plaintiff for the shipments which were always made to plaintiff and could only be received by the holder of the bill of lading. The last time defendant renewed his guaranty was on the 9th of November, 1903, in response to plaintiff's letter of November 6th as above stated.

Defendant J. H. Bumgarner was present in person at the trial and was placed upon the witness stand by plaintiff for the purpose of showing and did prove that his principal, Harry Bumgarner, had become insane and was an inmate of an hospital for the insane; and also for the purpose of accounting for papers supposed to be in his possession relating to this case which he obtained from Harry Bumgarner. He admitted to having a large bundle of papers in the courthouse at the term of court before that relating to the case but stated that he had turned them over to his attorney, Mr. Casto. He gave no testimony in relation to the correspondence between either himself and the plaintiff or between Harry Bumgarner and plaintiff. While the fact that defendant was present in person at the trial and did not as a witness for himself deny the authenticity of the letters purporting to be signed by him nor the fact that he had received the letters of the plaintiff put in evidence may not be conclusive of anything, it strengthens the presumption that the letters were received and sent by him as shown. *Railroad Co.* v. *Roberts*, 10 Col. App. 87-91. The defendant offered no evidence in the case. In addition to the evidence of Arthur Coon, who proves the account of plaintiff, J. G. Clarke, a witness for plaintiff, testified that he was with Harry Bumgarner, saw the orders and helped to deliver the goods, went with him on

the wagon when he was delivering them, saw the invoices that were sent to him; that he was showing Harry how to take the goods out and they were put in piles and then taken and delivered to the customers, the different packages of goods with the orders on. Harry had several men working for him in selling and delivering the goods, orders were taken by all the men and the goods would all come together to Harry. Clarke says Harry got the goods, that he saw him get them and that he collected the money for them, says there might have been one order he did not see Harry get, he is not sure about that "But the other orders I was with him and helped him receive them and check them out and distribute them and deliver them and collect the money for them: that is, he did the collecting." J. W. Woodyard also testifies to Harry Bumgarner receiving quite a large delivery of goods, did not know how much; Howard Showalter also helped Harry make delivery of two lots of goods and Harry collected the money for them. Arthur Coon testifies to the actual delivery of the goods, all the shipments, to the common carrier and the presumption is that they were delivered in due course of business. I have said above that the exceptions of defendant to the ruling of the court in many instances in admitting certain letters of plaintiff to Harry Bumgarner and enclosures therewith, and Harry Bumgarner's letters to plaintiff over the objections of defendant were well taken because of insufficient proof of mailing and identification. While this is true they were immaterial errors not prejudicial to the defendant. If all such objections had been sustained and the evidence excluded, still the plaintiff had ample proof to sustain its action and to entitle it to its verdict. In *Railroad Co.* v. *Roberts*, 10 Col. App. 87, it is held: "The admission of incompetent evidence over objection should not reverse a case when it is clear such evidence could have worked no prejudice." And *Plow Co.* v. *Munger*, 52 Kan. 371, it is held: "Immaterial errors not prejudicial to the rights of the defeated party are no ground for a new trial."

During the trial the defendant demanded the production of the plaintiff's books of original entry and excepted to the ruling of the court in overruling his motion. The production of the books at the time they were so demanded would have

been a great inconvenience and could not have been done except at much delay in the trial, and they should have been called for, if wanted, at the taking of the deposition of Arthur Coon, the bookkeeper, which deposition was taken in the City of Chicago where the plaintiff's place of business was. The account from the books made by said bookkeeper and filed with the declaration and proved by him from entries made in the due course of business was proved in the usual way of proving accounts in *assumpsit* according to the universal practice in our courts and was sufficient. *Vinal* v. *Gilman*, 21 W. Va. 301. Counsel for defendant says plaintiff failed to show that notice was given to defendant of the failure of his principal, Harry Bumgarner, to pay for the goods purchased within a reasonable time after default. It is shown that statements were furnished him of the status of his son's account time after time and several times at his request. Counsel for defendant further claims that the declaration was not good, but seems to forget that he failed to demur to the declaration. Section 3, chapter 134, Code, provides that no judgment shall be stayed or reversed for any defect, imperfection or omission in the pleadings, which might have been taken advantage of on a demurrer or answer but was not so taken advantage of. *Land and Improvement Co.* v. *Karn*, 80 Va. 589. Counsel for defendant says it was error to admit in evidence the guaranties mentioned in the declaration and excepted to the ruling of the court in refusing to strike them out as evidence. Section 40, chapter 125, Code, says: "Where a declaration or other pleading alleges that any person made, endorsed, assigned or accepted any writing, no proof of the handwriting of such person shall be required, unless the fact be denied by an affidavit with the plea which puts it in issue." *Dix* v. *Robinson*, 18 W. Va. 528; *Maxwell* v. *Burbridge*, 44 W. Va. 248, in which last case it is held that unless the affidavit is filed denying such paper, it is error to admit testimony attacking the genuineness thereof.

For the reasons stated there is no reversible error in the judgment of the circuit court and the same is affirmed.

Affirmed.

CHARLESTON

DAY *v.* FAY *et al.*

STATE *v.* DAY *et al.*

Submitted February 13, 1906. Decided February 20, 1906.

1. TAXATION---*Tax Sale---Affidavit of Sheriff.*
The syllabus in *State* v. *McEldowney, et al.*, 55 W. Va. 1, (47 S. E. 653), approved, (p. 68,)

2. PRINCIPAL AND AGENT---*Evidence of Agency---Burden of Proof.*
Where a tax deed is sought to be set aside on the ground that the vendee therein was the agent of the former owner to pay the taxes on the land conveyed, the burden is on the party seeking to set such deed aside to prove such agency. (p. 68.)

3. TAXATION---*Setting Aside Tax Deeds---Allegata et Probata.*
A case where the evidence is insufficient to establish the allegations of the bill. (p. 75.)

(MCWHORTER, PRESIDENT, *dissenting*):

Appeal from Circuit Court, Greenbrier County.

Bills by Alice C. Day against H. H. Fay and others and by the State against Alice C. Day and others. Decree for Alice C. Day against A. G. Williams, and bill by the State dismissed; and the State and said Wliliams appeal.

Affirmed in part.
Reversed in part.
Bill of Alice C. Day Dismissed.

WILLIAMS & DICE, for appellants.

JOHN W. ARBUCKLE, HENRY GILMER, W. G. MATHEWS, and WATTS, GAINES, DAVIS & MATHEWS, for appellees.

SANDERS, JUDGE:

On Dec. 19, 1857, John Williams, the father of A. G. William, the appellant, granted to the father of the appellee, A. G. Chenoweth, a tract of 400 acres of land, situated in Greenbrier county. A. G. Chenoweth was a minister of the Methodist Episcopal church, and, for some time prior to the war between the States, was stationed at Frankford, in Greenbrier county, but removed from that place, and died

intestate, in the year 1864, in the State of Indiana, leaving a widow and several children.

The widow, Ann C. Chenoweth, died testate in the year 1881, devising all her property, both real and personal, to her daughter, the appellee here.

This tract of 400 acres of land was returned delinquent for the non-payment of taxes thereon for the years 1885 and 1886, and sold on the 7th day of November, 1887, and purchased by the appellant, A. G. Williams, and the clerk of the county court of Greenbrier county, on the 17th day of May, 1889, made him a deed for it. On the 22nd day of December, 1890, Williams conveyed said tract of land to H. H. Fay and others, trustee of the Gauley Coal Land Association.

On the 4th day of February, 1903, the plaintiff, Alice C. Day, filed her bill in the circuit court of Greenbrier county, alleging that during the life time of her father, A. G. Chenoweth, the taxes on this land had been regularly paid, and that after his death her mother made arrangements with the appellant, A. G. Williams, by which he was to pay the taxes on this tract of land, and that her mother sent to him, at stated times, money to cover the amounts paid by him on said taxes; and that, up to the death of Mrs. Chenoweth, in the year, 1881, Williams faithfully and conscientiously attended to the matter for her. That after the death of her mother, she wrote to the Auditor of this State, and also to the clerk of the circuit court of Greenbrier county, for information, and through information derived from this correspondence, she was placed in communication with J. H. and S. B. Williams, brothers of A. G. Williams, and wrote to them in regard to the matter. That she received a reply from S. B. Williams. telling her that A. G. Williams had been paying the taxes on the land for Mrs. Chenoweth; and that, acting upon this letter she, in 1882, wrote to A. G. Williams in regard to the land and the payment of taxes thereon; and, growing out of the correspondence thus begun, and what is shown of the previous dealings between Mrs. Chenoweth and the appellant, A. G. Williams, Mrs. Day claims that Williams became her agent to pay the taxes, and that the purchase of the land by him at the tax sale in 1887 should be held to be a purchase for her, and that the conveyance to

the Gauley Coal Land Association should be set aside. Plaintiff's bill is drawn with double aspect, and seeks, first, to have the various deeds constituting the title of the Gauley Coal Land Company, to which company this land was conveyed by the Gauley Coal Land Association, set aside, and to recover the land for the alleged reason that the sheriff's affidavit to his return of the list of lands sold in November, 1887, is fatally defective. But this is not insisted upon in this Court. Second, it seeks to recover the land on the alleged ground that A. G. Williams was the agent of plaintiff for the purpose of paying her tax on this land, and that he failed to pay said taxes and suffered the land to be returned delinquent and purchased it at the tax sale, in his own name, in violation of his trust; and that the Gauley Coal Land Association purchased the land from him with knowledge of said alleged agency. And in the event plaintiff should fail to establish the fact that said company took the land with notice of such agency, the bill prays that she may be decreed the value of said land against the plaintiff.

The State of West Virginia, at October rules, 1903, filed a bill setting up that a tract of 400 acres of land, situated in Meadow Bluff district, in Greenbrier county, was forfeited in the name of A. G. Chenoweth for failure to enter the same for taxation after the year 1900, and was liable to be sold for the benefit of the school fund. The defendant, Alice C. Day, filed her answer, denying that said land was forfeited, on the ground that Williams was her agent to pay the taxes, but, in the event that the court should hold that said title was forfeited, she asked to be allowed to redeem. The final decree shows that these two causes were heard together, and the bill filed by the State was dismissed, and a recovery taken in favor of the plaintiff, Alice C. Day, against the defendant, A. G. Williams, for $9,000, and from which decree the State and A. G. Williams have appealed.

The claim made by the plaintiff, Alice C. Day, in her bill, that the tax deed from Buster, Clerk, to Williams, is void for irregularities in the proceeding under which it was made, has been abandoned; or, at least, is not insisted upon in this Court, and it will only be necessary to state that it is no

longer an open question in this State that such irregularities as are complained of will not vitiate a tax deed, but are cured by the provisions of section 25, chapter 31, Code. *Boggess* v. *Scott*, 48 W. Va. 316; *State* v. *McEldowney*, 54 W. Va. 696; *Kendall* v. *Scott*, 48 W. Va. 251; *State* v. *McEldowney*, 47 S. E. R. 653; *Hornage, et al* v. *Imboden, et al.*. decided at this term.

This brings us to the consideration of the claim made by the plaintiff, Alice C. Day, that A. G. Williams was her agent to pay the taxes on the 400 acre tract, and that he failed to do so, and suffered the land to be returned delinquent, and purchased it at the tax sale in his own name, in violation of his trust with her. The burden is upon Mrs. Day to show such agency, or the existence of such relation, between herself and Williams, as rendered it improper for Williams to become the purchaser. Has she done so? This question can be very clearly answered in the negative; and it is hardly necessary, when a case turns purely upon a question of fact, for this Court to undertake in detail to point out the reasons for its conclusions; but a brief reference to the facts in this case will be made to show the false clamor of the plaintiff, Mrs. Day.

A. G. Chenoweth died in 1864 and Mrs. Chenoweth in 1881. Mrs. Day claims that A. G. Williams was the agent of her mother, during her life time, to pay the taxes on this land, but the only evidence tending to show this is that A. G. Williams himself admits that at one time he received some money from his brother, S. B. Williams, which had been sent to S. B. Williams by Mrs. Chenoweth to apply on the taxes, and that he, A. G. Williams, paid it to the sheriff. This is the only money shown to have come into his hands from Mrs. Chenoweth, and it is also shown that he applied it as he was requested to do. By Mrs. Chenoweth's will Mrs. Day was made her sole devisee, yet, if such ever existed, she has utterly failed to produce any correspondence between her mother and A. H. Williams in reference to this land, or the payment of taxes thereon.

At the time of the death of her mother, Mrs. Day was living in Michigan, and soon thereafter she wrote to the Auditor of this State, and to the clerk of the county court of Greenbrier county, in reference to this 400 acre tract,

and, as a result of this correspondence, she was put into communication with J. H. and S. B. Williams, brothers of A. G. Williams, and wrote to them, and, on Oct. 12, 1881, she received a reply from S. B. Williams, telling her that A. G. Williams said he had received money from her mother and had kept the taxes paid up until that time. This letter, of course, is not evidence against A. G. Williams. Mrs. Day paid no further attention to the matter until Nov. 28, 1882, more than a year after she received the letter from S. B. Williams, when she wrote to A. G. Williams, in regard to the land and the payment of taxes thereon. This letter is significant in view of the alleged agency of A. G. Williams, as the whole tenor of the letter is that Mrs. Day desires to know the amount of the taxes, and when they fall due, so that she can attend to it. She says, "Will you be so kind as to let me know when they fall due and how much it is so that I can relieve you in future?" There is no intimation that she wanted him continue as her agent, admitting that he had been the agent of her mother. In reply to this letter, Mrs. Day received a postal card, dated Dec. 14, 1882, and signed by A. G. Williams, but which is admittedly not in his handwriting. A great deal of evidence was taken in an endeavor to establish the fact that this postal is in the handwriting of one James A. Donnally, a stepson of Williams; and who attended to a great deal of business for him; and Williams himself says that it looks to be in Donnally's handwriting, and that he doesn't believe that Donnally would have written it without being authorized so to do. Counsel for Mrs. Day attach great importance to this postal, and interpret the words, "I will attend to the business for your mother," as meaning that Williams would attend to it for Mrs. Day on account of her mother. But Mrs. Day herself places a different interpretation upon it. In her deposition, she says: "The reference in the card to his attending to the business for my mother means the method he would use in transferring the legal title of the land from my mother or otherwise to me." And, while it is now admitted that the postal was writen by some one other than Williams, she says, in her deposition, "I am familiar with A. G. Williams' signature and handwriting, having frequently read letters from him to my mother, and

also from having received letters from him, and I identify the writing on the postal card and the signature as his." But Williams goes further in the postal card, and says: "James Knight, a good friend is the sheriff and is perfectly safe if you write him at Lewisburg all will be right." Here he gives her the name and address of the tax collector, and suggests that she write him in regard to the matter. What more could Mrs. Day expect from Williams in the payment of taxes, or looking after this land for her, after he had given her the information for which she asked in her letter? After the receipt of the postal card, Mrs. Day says that she wrote to A. G. Williams to pay the taxes and keep an account of the amount, and send same to her, and she would reimburse him, and that she received a reply from him, in which he stated that the amount was a mere trifle, that he would pay it along with his own taxes, that the amount was so small it had not impressed itself upon him, but that at some time he would furnish her such statement. She filed neither this letter nor the reply thereto. The letter written by Mrs. Day of date Nov. 28, 1882, and the postal reply thereto, is the only correspondence that is shown to have passed between the parties prior to the time that the land was returned delinquent, purchased by Williams and conveyed to him. Upon this correspondence, and the letter which she claims to have received from Williams saying that he would pay the taxes, Mrs. Day predicates the agency which is the foundation for her suit. She nowhere shows, or attempts to show, that Williams ever received one cent of money from her to be applied on the payment of these taxes. The burden of proof is upon her to establish agency, and she endeavors to do so mainly on the contents of a letter which she does not file, but the loss of which she accounts for by the fact that, owing to the ill health of herself and her first husband, Smart, she was almost continually traveling; and also by the fact that she was an authoress and magazine editor, with a great many manuscripts to examine, and a large correspondence in many countries. Williams denies that he ever wrote the letter which she claims to have received from him saying that the taxes were a mere trifle, but, on the contrary, says that he himself was hard pressed, during the time that this trans-

action is alleged to have occurred, to keep the taxes paid on the land owned by him.

After the year 1882, nothing further appears to have been done by Mrs. Day until 1891, when she wrote to A. G. Williams that she was coming to Ronceverte, and for him to meet her there. She came to Ronceverte, and met Williams for the first time at a county fair held at Lewisburg, at which time she says that Williams told her that the land had been sold and purchased by him, but that it was a benefit to her that he had done so; that he would buy the land from her, and a price of $3,000 was named, or convey her another tract in lieu thereof, or re-convey to her the tract purchased. Williams denies that he ever offered to re-convey the land to her, but says that he, at that time, told her that he had sold and conveyed the land to the Gauley Coal Land Association, but he admits that he offered to convey her another tract in lieu of the one purchased by him, and says that he always intended to convey the land itself, or other lands of equal value, to the proper claimant, but that Mrs. Day, when she came to see him in 1902 in regard to the matter, claimed that he was her agent to pay the taxes, and, inasmuch as he did not consider that he was under any legal obligation to her, he refused to do anything in the premises. Williams' claim that he told Mrs. Day in 1891 that he had conveyed the land to the Gauley Coal Land Association is borne out by the fact that when, in 1892, her husband, Smart, visited Williams with a view to looking at the land which Williams was to convey to her, Williams wrote her a letter, in which he stated that "if you will make me such title as will remove all clouds from the present one, then I will make you in consideration thereof a deed to two hundred and fifty acres of my land." This letter was sufficient, on its face, to notify her that either he had disposed of the land and could not convey it to her, or that, if he still had it, he would not convey it to her. In either event, it was her duty to proceed promptly to recover it; but, instead, she did nothing further until the year 1902, ten years thereafter, when she came to Greenbrier county, and, as she claims, learned for the first time that Williams had disposed of the land.

There was no taxes paid on this land for the years 1881 to 1886, inclusive, by any one, until after it had been returned

delinquent and sold. Mrs. Day alleges in her bill that the taxes for the years 1881 to 1884, inclusive. were paid by Williams, and this is true, but these taxes were not paid until 1890, after the land had been returned delinquent and sold for the taxes of 1885 and 1886, and purchased by him. Williams says that the only reason he paid these taxes was, that the sheriff still held the tickets, and would havc lost the amount represented by them, had he not done so.

Admitting, for the sake of argument, that A. G. Williams was the agent of Mrs. Chenoweth, during her life time, to pay the taxes which the plaintiff, Mrs. Day, has wholly failed to establish, yet the agency terminated upon the death of Mrs. Chenoweth, and even if it were true that Mrs. Chenoweth furnished the money with which to pay the taxes up until the year 1880, it is equally true that during the entire time of the alleged transaction between Mrs. Day and Williams, extending over a period of more than twenty years, not one cent of money was ever paid by her on these taxes, and nowhere has she shown that Williams was her agent to pay them for her. On the contrary, in the only letter which she wrote to Williams before the tax sale, and the purchase by him of the land, she asks him to give her the amount of the taxes, and when they became due, so that she could take the matter in her own hands and relievc him in future.

Mrs. Day, in her deposition, says: "I have read letters written by my mother to the Williamses, and especially A. G. Williams, and also letters from the latter to my mother with reference to the payment of taxes on this land, and know from my own knowledge that mother sent Albert G. Williams money from time to time before her death in 1881 to pay taxes on this land." Where are these letters? Being the sole devisee of her mother, it is only reasonable to suppose that, after her death, Mrs. Day came into possession of all her papers, yet she does not produce the letters to which she refers in her testimony, and gives no excuse for not doing so. And again, this testimony is not consistent when viewed in the light of her actions after the death of her mother. If A. G. Williams had been attending to the matter of paying the taxes for her mother, as she says, and

she was aware of the fact, it would hardly have been necessary for her to have written to the Secretary of State and to the clerk of the county court of Greenbrier county, to ascertain whether or not the taxes had been paid, and if so, by whom. Then it is shown, by her own testimony, that she wrote first to S. B. Williams, and not until 1882 did she communicate with A. G. Williams, the man, who, according to her own contention, had been paying the taxes all these years.

Viewed in the light of all the circumstances, and given the greatest weight possible for Mrs. Day, the evidence wholly fails to show that A. G, Williams was the agent for either Mrs. Chenoweth or Mrs. Day in the matter of paying taxes on this land.

We recognize the rule laid down by this Court that if the evidence is conflicting and contradictory to such an extent that reasonable men may differ as to the true preponderance thereof, this Court will not reverse the finding of the circuit court; but, to secure such reversal, the evidence, when sifted, must plainly preponderate against the decree. *Naughton* v. *Taylor*, 50 W. Va. 233; *Kennewig* v. *Moore*, 49 W. Va. 323; *Bailey* v. *Calfee*, 49 W. Va. 630; *Weaver* v. *Akin*, 48 W. Va. 456; *Camden* v. *Dewing*, 47 W. Va. 310; *Whipskey* v. *Nicholas*, 47 W. Va. 35; *McIntosh* v. *Oil Co.*, 47 W. Va. 382; *Spurgin* v. *Spurgin*, 47 W. Va. 38, and many other cases laying down the same rule. But this rule does not apply to the case we have here, and should only apply where the evidence is conflicting, and when, upon the whole evidence, it is doubtful as to what decree should be entered; and then, again, it certainly does not apply where the decree has been rendered in favor of one who has not made out a *prima facie* case. A *prima facie* case must always be made out, and in the establishment thereof, and in the proof rebutting such *prima facie* case, if there is such a confiict in the evidence as to render it doubtful what conclusion should be reached, then this court should accept the conclusions of the trial Judge; but the plaintiff, Mrs. Day, has wholly failed, in our opinion, to establish even a *prima facie* case, and this being so, the question of conflict of testimony does not arise. As before noted, the very basic principle relied on for recovery is that Williams was

her agent, and in her endeavor to show this we can but conclude that she has entirely failed. Counsel for Mrs. Day cite the case of *Ruffner, Donnally & Co.* v. *Hewitt*, 7 W. Va. 604, to show that an agent may be ordinarily appointed by parol, in the broad sense of that term, at the common law, that is, by verbal declaration, in writing not under seal, or by acts and implications; and also cites Story on Agency, sections 15 and 54, to sustain the view that an agency may be created by express words or acts of the principal, or may be implied from his conduct or acquiescence, and that the nature and extent of the authority of an agent may be implied or inferred from the circumstances; and that the usual mode of the appointment of an agent is by an unwritten request, or by implication from the recognition of the principal, or from his acquiescence in the acts of his agent. The correctness of these authorities is not and cannot be disputed, because they enunciate plain legal principles, but the facts of this case are not such as to make Williams the agent of Mrs. Day, under the application of this doctrine.

Then, again, a great deal of authority is cited to support the view that when an agency has been once established to act with reference to the care of, and payment of taxes on real estate, that such an agency cannot be terminated without proper and legal notice to the principal of such termination, and the burden is upon the agent to show the termination; and particularly is it necessary when the agent obtains property with which he is entrusted, without the knowledge and consent of the principal. *Murdock* v. *Miller*, 84 Mo. 96. "Nor will an agent be allowed to make use of his position and information thereby obtained to acquire an interest adverse to his principal, and any interest so obtained will be decreed to be held in trust for the principal. That an agent employed to manage property cannot acquire title thereto by purchase at a sale for taxes or sheriff's sale," etc. 1 Am. & Eng. Ency. Law, (2d Ed.), 1085, and citing many cases.

These authorities are not questioned, and it is not necessary for us to discuss them, inasmuch as we hold that no agency has been established.

This brings us to the question as to whether or not the court decreed properly in dismissing the bill of the State in

the second above mentioned cause. The decree in this respect is so plainly right that it is hardly necessary to make any comment upon it. The land was returned delinquent for the non-payment of taxes in the name of A. G. Chenoweth, sold by the State, purchased by Williams in 1887, and conveyed to him by the clerk of the county court. This conveyed to him all the right, title and interest of A. G. Chenoweth, thereby leaving no title in him to be forfeited, and since the purchase by Williams, the taxes have been paid by him and those claiming under him.

The decree of the circuit court, dismissing the bill of the State is affirmed; but it was error to refuse to dismiss the bill of the plaintiff, Alice C. Day, and in taking a recovery in her favor. Therefore, in this respect, the decree is reversed, and her bill dismissed.

Affirmed in part.
Reversed in part.
Dismissed, as to Alice C. Day.

CHARLESTON

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LEWIS, HUBBARD & CO. *v.* MONTGOMERY SUPPLY CO.

Submitted February 13, 1906. Decided February 20, 1906.

1. BILLS AND NOTES—*Presentation of Checks—Diligence.*

   A person receiving a check, on a fund in the hands of a bank, for the amount of a demand against the drawer thereof, is bound to exercise reasonable diligence in making presentment thereof for payment, if he wishes to avoid risk of loss by insolvency of the drawee. (p. 79, 80.)

2. SAME—*Time for Presenting.*

   If the payee of the check and the drawee reside, or have their places of business, in the same city or town, presentment must be made before the expiration of business hours of the day next after the day of the receipt thereof. (p. 81.)

3. SAME—*Forwarding by Mail.*

   If the person receiving a check and the bank on which it is drawn are in different places, it must be forwarded, for presentment, by mail or other usual mode of transmission, on the next

day after the receipt thereof at the place in which the payee resides or does business, if reasonably and conveniently practicable; and, if it is not so practicable, then by the next mail or other similar means of conveyance, leaving after said date. (p. 81,)

4. SAME.

Neither payee nor his agent is required to transmit such check by the only, or last, mail of the day next after its receipt, if such mail closes or departs at an hour so early as to render it inconvenient for the holder to avail himself of it. (p. 85.)

5. SAME.

What is an unreasonably early hour in such case, depends upon all the circumstances of the transaction and situation of the parties; and, the facts being free from controversy and doubt, is a question of law for the court. (p. 85.)

6. SAME—*Collection through Bank.*

In the absence of any agreement to the contrary, and of any circumstance, known to the payee, making it imprudent to do so, he may endorse and deliver the check to a bank for collection; but this does not extend the time within which it must be forwarded for presentment. The bank, however, in such case, is not required to forward it on the next day after its receipt by the payee, if there be no reasonably convenient means of doing so, within the banking hours of that day. (p. 85.)

7. SAME—*Judicial Cognizance of Existence of Banks.*

Though the courts of this State cannot have judicial knowledge of the existence of any particular bank, or of any mode of business peculiar to a given bank, they will take judicial notice that, in all cities and towns of large population and extensive business, within their jurisdiction, banks exist, and of the fact that their operations are governed by reasonable rules and regulations, to which parties dealing with them, or in commercial paper, are deemed to have subjected themselves. (p. 87.)

8. SAME.

Courts cannot take judicial notice of the business hours of any particular bank, but the courts of this State judicially know that ordinarily banks in the cities and larger towns of the State do not open their doors for business at an earlier hour than 9 o'clock A. M. (p. 88.)

9. BILLS AND NOTES—*Presentation of Check.*

The parties to a check drawn on a bank and sent to a distant place to be forwarded for presentation, are deemed in law to have acted with knowledge of the usual diligent method of making such presentment through a bank at the place to which it is sent, and to have agreed to suffer any reasonable delay incident to such mode of presentment. (p. 88.)

10. SAME—*Liability of Drawer of Check.*
In such case, the drawer, by allowing his funds to remain in the drawee bank, and the payee, by accepting the check, evince belief in the solvency of the bank, and the former voluntarily takes the risk of its solvency during the reasonable period necessary for presentment of the check in the usual manner. (p. 88.)

11. SAME.
The drawer, in delivering a check to an agent of the payee, having no authority to endorse it, at the place of business of the drawer, impliedly agrees to allow such additional time for presentment as may be necessary for the transmission of the check to the principal of the agent. (p. 88.)

12. SAME.
Failure to present a check does not bar recovery from the drawer, if the time intervening between delivery thereof and the failure of the bank, is not sufficient for presentment by the exercise of such diligence as the law requires. (p. 88.)

13. APPEAL—*Reversible Error—Instructions—Evidence.*
It is reversible error to give an instruction, presenting an hypothesis which has no foundation in the evidence adduced, unless the court can clearly see that it did not prejudice the exceptor. (p. 90.)

14. TRIAL—*Offer of Evidence—Rejection.*
An offer of evidence, not appearing in any way to be relevant and material, is properly rejected. (p. 90.)

Error to Circuit Court, Fayette County.

Action by Lewis, Hubbard & Co. against the Montgomery Supply Company. Judgment for defendant, and plaintiffs bring error.

Reversed.

BERKELEY MINOR, JR. and PAYNE & HAMILTON, for plaintiffs in error.

DILLON & NUCKOLLS, for defendant in error.

POFFENBARGER, JUDGE:

A question of commercial law arises on this record. Lewis, Hubbard & Co., of the city of Charleston, doing a wholesale business in groceries, had, prior to the 24th day of September, 1900, sold goods to the Montgomery Supply Co., doing a retail grocery business in the town of Montgomery, and, on that day, there was due from said last mentioned concern the sum of $183.69. On that day W. G. Hubbard, a traveling

salesman for Lewis, Hubbard & Co., was at Montgomery, called upon the Montgomery Supply Co., received from it, not earlier than four o'clock P. M. of that day, a check for the amount of the bill, payable to Lewis, Hubbard & Co., drawn on the Montgomery Banking & Trust Co., a bank in Montgomery, neglected or failed to forward the same to his principal, and went on from Montgomery to call upon other customers of his house, taking the check with him. He received the check on Monday, the 24th day of September, and, on Friday, September 28th, the Montgomery Banking & Trust Co. failed to open its doors for business, went into the hands of a receiver and finally paid a small percentage to its depositors. The drawer of the check had ample funds in the bank to pay it, and it presumably would have been paid, had it been presented for payment, at any time during banking hours on Thursday the 27th. It was afterwards sent to the bank through proper channels and protested.

This action was brought by Lewis, Hubbard & Co. against the drawer of the check, in a justice's court, and went from that court to the circuit court of Fayette county, where judgment was rendered in favor of the plaintiff for the sum of $26.60, the amount received by the defendant as a dividend on its deposits from the assets of the defunct bank. This judgment being substantially one for the defendant, the plaintiff has brought the case to this Court on a writ of error.

From the testimony in the case, it appears that Hubbard had authority to collect and to give receipts for his collections, but did not have authority to endorse checks in the name of his principal and receive money thereon. It further appears that, had he promptly mailed the check to his principal, it would have been received by it the following day, and, if discounted at Charleston on the same day and promptly forwarded back to Montgomery within business hours of that day, it would have reached the latter place not earlier than Wednesday morning. The mails left Montgomery for Charleston three times a day, namely about noon, between three o'clock and five o'clock P. M. and between seven o'clock and eight o'clock P. M. The first two reached Charleston in about one hour's time. But the last one, de-

livery was made in Charleston the next day. The east bound train took western mail at Montgomery, carried it east and delivered it to a west bound train which passed Charleston at about three A. M. the next morning. The mails from Charleston reached Montgomery twice a day, one at about six A. M. and the other between ten and eleven A. M. It was by the latter one that mail could be posted at Charleston and be received at Montgomery on the same day. If, therefore, the plaintiff was bound by law to exercise the utmost diligence possible under the circumstances to obtain the money on the check, and is precluded from recovery by its failure to exercise such diligence, its case would clearly fail; for it could have had the check presented for payment at Montgomery on Thursday. But, if the law does not demand of the holder of a check the utmost diligence and haste in procuring payment of it by the drawee, the question depends upon the degree of diligence that is required. If such diligence did not require the discounting or depositing of the check at Charleston on the day of its reception at that place by the plaintiff, and it was allowable to deposit at a Charleston bank on the next day, namely, Wednesday, it could not have reached Montgomery until Thursday, unless deposited and forwarded early in the morning, for the last mail from Charleston to Montgomery left on that day not later than ten o'clock A. M., for it arrived at Montgomery between ten and eleven o'clock A. M. The mail for that train would probably close by 9:30 o'clock A. M. If the plaintiff was bound to put the check in the hands of the bank in time for that mail on Wednesday, it was necessary, therefore, to do so on Tuesday or at an early hour on Wednesday. If the plaintiff was bound to deposit it on the same day of its reception and the Charleston bank was not required to forward it until the next day, it would not have reached Montgomery until Thursday, unless mailed at an early hour on Wednesday. If so, and the Charleston bank had the whole of the business day in which to mail it, it would not have reached Montgomery until Thursday. If it had been received at Montgomery by the agent or correspondent of the Charleston bank on Thursday, then the question arises, whether the agent or correspondent was bound to present it on the day of its reception or was entitled to hold it until the next day,

Friday. Upon the answers to these questions, to be found in the principles declared by the courts, the correctness of some of the positions taken by the attorneys in the case, depends.

In some respects, the rights of the parties to a check, drawn by an individual on a bank, are governed by the principles applicable to the parties to an inland bill of exchange; but not in all respects. Notice of dishonor and non-payment of a check, and diligence in the presentation thereof are required, only when it is necessary to protect the drawer from loss by reason of the failure of the drawee, holding funds of the drawer sufficient to pay the check. Presumably the check is drawn upon funds in the hands of the drawee belonging to the drawer, and amounts to an appropriation thereof in favor of the payee on the check, and he owes to the drawer the duty of exercising a certain amount of diligence to obtain payment in order to prevent a loss to the drawer by reason of failure of the bank. In other words, if he fails to perform such duty, the loss falls upon himself and he is barred by law of any right to recover against the maker of the check. If, by delay in presentation, a loss occurs, the payee or holder is deemed to have extended credit to the bank, and must suffer the consequences. *Cox* v. *Boone*, 8 W. Va. 500; *Compton* v. *Gilman*, 19 W. Va. 312; *Pursell* v. *Allemong & Son*, 22 Grat. 739; 5 Am. & Eng. Ency. Law 1030; Parsons on Notes and Bills, Vol. II pp. 58, 59; *Bank* v. *Bank*, 10 Wall. 380.

For the reasons above stated, presentation of the check for payment, at the bank on which it is drawn, must be made within a reasonable time, and what is a reasonable time depends upon the situation of the parties with reference to one another and with reference to the bank, and all other material facts and circumstances entering into the transaction. When the drawee and payee are in the same town or city, presentation must be made not later than the next day after the reception of the check, unless there is some understanding or agreement to the contrary or some circumstance intervenes or is connected with the transaction sufficient to vary the rule; but it is sufficient to present it at any time on the next day within business hours. *Alexander* v. *Birchfield*, 1 Car. & Marsh. 75, (41 E. C. L. 47.) In that case, Tindal, C. J.,

said: "The only way in which I can state the rule to you is this, that, if a party receive a check on a particular day, he may present it at any time during banking hours on the following day to that on which he received it." See also to the same effect *Moule* v. *Brown*, 4 Bing. N. C. 266, (33 E. C. L. 347); *Cox* v. *Boone*, 8 W. Va. 500; *Simpson* v. *Ins. Co.*, 44 Cal. 139; *Cawein* v. *Brewinski*, 6 Bush. (Ky.) 457; *Schoolfield* v. *Moon*, 9 Heisk. (Tenn.) 171, *Boddington* v. *Schlencker*, 4 Barn. & A. 752; *Holmes* v. *Roe*, 62 Mich. 199; *Lloyd* v. *Osborne*, 92. Wis. 93; 5 Am. & Eng. Ency. Law 1042. But when the person receiving the check is at a place different from that of the place of business of the drawee, additional time is allowed. The person receiving it need not forward it for presentment on the day of its reception, but may do so on the next day thereafter, and the person to whom it is forwarded for presentation need not present it on the day of reception, but may do so on the next day after he receives it. In this case two extra days are allowed, while in the other but one is allowed. 5 Am. & Eng. Ency. Law 1042; *Moule* v. *Brown*, 4 Bing. N. C. 266; *Holmes* v. *Roe*, 62 Mich. 199; *Prideaux* v. *Criddle*, L. R. 4 Q. B. 455. *Griffin* v. *Kemp*, 46 Ind. 172, 176; *Burkhalter* v. *Bank*, 42 N. Y. 538; Parsons on Notes and Bills, 72. The reason for this indulgence is well stated by Story on Bills, section 290, in discussing the law of notice of dishonor and protest, in which the principle is generally held to be the same. He says: "In the first place then it is not by our law necessary in any case to give notice, either by post or otherwise, on the very day on which the dishonor and protest took place, although the holder is at liberty to do so at his option. He is always allowed, by law, a whole day for this purpose, and is not compellable to lay aside all other business to devote himself to that particular purpose. For it would be most inconvenient and unreasonable to require such strictness, as it might interfere with other business and duties quite as pressing and important; and therefore it is sufficient, if he sends notice by the post or otherwise by the next day." The same reason which suffices to give two days, one for reception and the other for presentation, when the payee and drawee are at the same place, justifies the general rule, allowing four days when they are at different places.

In view of these principles, the way to a conclusion would

seem to be perfectly clear but for the circumstance of there being no mail from Charleston to Montgomery on the afternoon of Wednesday, the last day allowed by the rule for forwarding the check to Montgomery. Did this circumstance make it necessary to forward the check in the mail leaving Charleston at about nine or ten o'clock A. M.? If not, and it was allowable to deposit it in the postoffice within business hours on Wednesday, it could not have reached Montgomery until Thursday. Enough has been stated to clearly demonstrate that the utmost diligence possible is not required. The payee is bound to exercise only reasonable diligence and need not do that which is contrary to, or variant from, the ordinary and prudent mode of transacting business. But the law does seem to require such action, within reasonable limitations, determined by considerations of convenience, but not of leisure, as is calculated, in view of the possibilities of loss, by delay, to prevent it. Hence, the two-day rule, allowed for forwarding notices or paper for presentment, is subject to this qualification, namely, that it must be sent by the mail of the second day. If there be more than one mail on that day, it need not go by the first; but, if there be but one, it must go by it, unless it leave or closes at an unreasonably early hour. The whole of the second day is not allowed, unless the last mail of that day goes at the close of business. To this point, the American authorities seem to be unanimous.

They are ably reviewed, and the result clearly stated, by Chief Justice Green in *Burgess* v. *Vreeland*, 4 Zabr., 24 N. J. L. 71. In that case, the controversy related to presentment, non-payment and protest of a note and notice thereof, but the principles governing that subject are applicable to checks, when loss occurs by failure to promptly present them. "In the more recent edition of Kent's Commentaries, the rule is stated thus: 'According to the modern doctrine, the notice must be given by the first direct and regular conveyance. * * * This means the first *mail that goes after the next to the third day of grace;* so that if the third day of grace be on Thursday, and the drawer or endorser resides out of town, the notice may, indeed, be sent on Thursday, but must be put into the post office or mailed on *Friday, so as to be forwarded as soon as possible thereafter.* 3 Kent's Com.

(6th ed.) 105, 106. And in note *a* to page 106, the author further states, that the rule was laid down too strictly in *Lenox* v. *Roberts*, 2 Wheat 373; *viz*, that notice of dishonor must be put into the post office early enough to be sent by the mail of the day succeeding the last day of grace; and that the rule, as it is now generally and best understood in England and in the commercial part of the United States, is, that notice put into the post office on the next day after the third day of grace, *at any time of the day* so as to be ready for the first mail that goes *thereafter*, is due notice, though it may not be mailed in season to go by the mail of *the day after the default.* This is certainly very high authority on a question of commercial law, and the change in the statement of the principle shows that it was made deliberately and upon examination and reflection. Yet it is worthy of notice that this authority was before this Court at the time of the decision in the *Sussex Bank* v. *Baldwin*. It has since undergone the examination of other American courts without securing their concurrence of approbation. *Donnes* v. *The Planters Bank*, 1 Smedes & Marshall 261; *Wemple* v. *Dangerfield*, 2 *Ib.* 445. In both these cases the rule was held to be, that the notice must be in the post office in time to go by the mail of the day next after the day of protest, if a mail goes on that day, unless it leaves at an unreasonably early hour. In *Beckwith* v. *Smith*, 22 Maine 155, it was held that the notice must be in the post office in season to be carried by the mail of the next day after the note is dishonored. In *Chick* v. *Pillsbury*, 24 Maine, 458, it was held by a majority of the court, that it is sufficient if notice of the dishonor of a promissory note to be put into the mail within a convenient time after the commencement of business on the day succeeding that of the dishonor. In that case the note was protested in the city of New York on the 29th of November, and on the same day notice was given to the agent of the plaintiff; on the next day notice of dishonor, directed to the defendant, at his residence in Bangor, Maine, was put into the post office in the city of New York, between twelve o'clock at noon and eight o'clock at night. So far the facts correspond precisely with the facts of the present case. But it was further proved in the case that there was but one daily mail from the city of New York by which letters would go

to Bangor; that this mail closed at six, and left the city at seven in the morning, which in the month of November would be soon after daylight. The counsel of the defendant insisted that the notice was not mailed in season; that it must be put into the postoffice in season to go by the mail of the next day after dishonor, however early it might depart. And of this opinion was Shepley, J., who, in elaborate opinion after an able review of the cases, held that the strictest rule, requiring in all cases that the notice should be mailed in season for the mail of the day next after the dishonor of the note, was sustained by the weight of the authority. And it is remarkable that Justice Kent, notwithstanding the opinion previously expressed, that the party had the whole of the day following the third day of grace in which to mail notice of protest, concludes the note to which allusion has been made by saying, that he apprehends that the weight of authority is in favor of the view of the rule as taken by Mr. Justice Shepley. But the majority of the court in *Chick* v. *Pillsbury* held that the rule does not require that the notice should be mailed in season to go by the mail of the next day, however early it might close, but that it extends to the allowance of a convenient time after the commencement of business hours on the next day to prepare and dispatch the notice; and inasmuch as the notice was mailed in season to go by the next mail, which left on the day succeeding that of the dishonor after business hours had commenced, the notice in that case was adjudged sufficient. The principle is precisely in accordance with the ruling of this court in the case of *The Sussex Bank* v. *Baldwin*. There is, it is believed, no well considered adjudication that carries the doctrine further." *Burgess* v. *Vreeland*, 4 Zabr. 71, 77-80.

Morse on Banking, in treating of the law of diligence in respect to the presentment of checks, says in substance, at section 421, the same rules and principles are alike applicable to them and the giving of notice of protest. In the absence of agreement or special circumstances, the time allowed is as it has been hereinbefore stated. In sub-section (c) 2 of said section 421, he says: "The drawer cannot (except by agreement or under special circumstances as above) be held absolutely beyond the business hours of the day following his delivery of the check, if the bank is in the same

place, or if the bank is in another place, the period of his liability will be until the close of business hours on the first secular day following the receipt of the check by some one in the bank's locus, the check *having been mailed upon the day following its delivery by the drawer.*" At section 423 he states the qualification of the rule, under the special circumstances of the departure of the mail at an unreasonably early hour, citing *Cox* v. *Boone*, 8 W. Va. 500, in which the failure of the holder to send the check by the only mail of the day on which ordinarily it should have been sent, was excused, because it departed at 7:30 o'clock A. M. in the month of February. Had it departed at a reasonable hour, the decision would have been different. It would have been his duty to forward it on the next day after its reception.

The reason for requiring the check or notice to be forwarded on the second day, if it be practicable to do so, is apparent; for otherwise the effect would be to give the party three days instead of two and without any substantial reason therefor. The holder of a check cannot extend the time allowed him by depositing it in a bank for collection. *Alexander* v. *Birchfield*, 1 Cat. & Marsh. 75. It must be forwarded or presented on the next day after receipt, if reasonably practicable, whether it be done in person or by agent.

What is an unreasonable hour depends upon circumstances. If the court could say, as matter of law, that nine o'clock or half past nine o'clock A. M. is an unreasonable hour, within the meaning of this law, then we could say it would have been sufficient to have forwarded it in the mail of Thursday by depositing it in the post office at some time on Wednesday. No evidence was introduced showing the business hours of the banks in Charleston, nor the situation, with reference to the post office, of the bank with which the plaintiff transacted its business. Therefore, the question submitted to the jury was whether the time of departure of the mail, shown by the evidence, was, under ordinary circumstances, unaffected by any local custom or mode of business, an unseasonable hour. It did not involve any inquiry as to whether, under a given state of facts, a thing could reasonably be done or accomplished. It seems, there-

fore, to have presented very little matter of fact, if any at all, for the consideration of the jury, and to have been substantially a question of law. It has been frequently held that when the only question is the reasonableness of the time, the facts being undisputed, it is one of law for the court. It is rather a question of commercial law than one of mere fact, the exigencies of commercial transactions, and all the peculiarities of that kind of business, having established certain rules and regulations by which both court and jury are bound. *Taylor* v. *Sip*, 30 N. J. L. 384. *Rosenthal* v. *Erlicker*, 154 Pa. St. 399, holds that "When the only question is that of diligence and the facts are uncontroverted, it is one of law for the court." See also *Cawein* v. *Browinski*, 6 Bush. (Ky.) 457; *Walker* v. *Stetson*, 14 O. St. 89; *Linville* v. *Welch*, 29 Mo. 203. In *Downs* v. *Bank*, 1 S. & M. (Miss.) 261, 277, it is said the question is not what inference the jury might draw, but what testimony does the law require in the case? In *Prescott Bank* v. *Caverly*, 7 Gray (Mass.) 217, Bigelow, J., said: "Ordinarily, the question whether a presentment was within a reasonable time, is a mixed question of law and fact, to be decided by the jury, under proper instructions from the court. And it may vary very much, according to the particular circumstance of each case. If the facts are doubtful or in dispute, it is the clear duty of the court to submit them to the jury. But when they are clear and uncontradicted, then it is competent for the court to determine whether the time required by law for the presentment has been exceeded or not." Parsons on Notes & Bills, p. 340, says: "Where the facts are few and simple, and the acts or admissions of parties clear and unequivocal, the question is one of law for the court. But where the rights and liabilities of parties depend on contracts, and a variety of transactions and dealings arising therefrom, or where the facts are contradictory and complicated, it is a question for the jury to determine."

In the exercise of the power to determine what is a reasonable time, or whether an act is done within a reasonable time, according to the law merchant, the courts have always taken judicial notice of some of those customs, habits and practices which may be deemed to be a part of the knowledge and information of the people generally, and also of customs

and practices peculiar to banks and other financial and commercial institutions. They have determined repeatedly what is a reasonable hour for presentation of a bill for acceptance at the place of business of a trader, as well as for the presentation of a note or other negotiable instrument at a bank, marking a distinction between the two classes of institutions, due to the known difference in their hours of business. What is a sufficient presentation in point of time at the place of business of a merchant might not be sufficient in the case of a bank. Numerous illustrations of this will be found in the reported cases. In making such distinctions the courts necessarily take judicial notice of the difference in methods of transacting business. In some instances, they have expressly declared their power to take judicial notice of such matters. Thus, in *Davis & Co.* v. *Hanley*, 12 Ark. 645, it is said: "This court will take judicial notice of the general custom and usages of merchants,' as well as of the 'general custom of our own country,' as matters that are generally known." Wigmore on Ev. at section 2580, says: "Courts are found noticing, from time to time, a varied array of unquestionable facts, ranging throughout the data of commerce, industry, history, and natural science. It is unprofitable, as well as impracticable, to seek to connect them by generalities and distinctions, for the notoriousness of a truth varies much with differences of period and of place." In the note to this section the author cites a vast number of instances, illustrating the proposition. As indicated by his language, the basis of judicial notice is the common notoriety of the thing which the courts judicially observe. While a court cannot take judicial notice of the existence of a bank in any particular place nor of the peculiar methods of business adopted by any bank, they must presume that every bank operates under some reasonable rules and regulations in the transaction of their business; and that parties in dealing with them or making themselves parties to commercial paper, contemplated the delay, incident to, as well as the promptness, designed to be effectuated by, such rules and regulations. They do not expect a bank, handling a large number of important securities or commercial instruments each business day, to give to one any particular or special attention, not ordinarily given to others of the same class. It is no-

torious that, for business purposes, banks open their doors later, and close them earlier, than other institutions, and that, as a rule, in cities and towns of considerable size, they are never open earlier than nine o'clock A. M. Charleston is a city of considerable proportions, in which there must necessarily be a number of banks, doing business after the manner and customs adopted by banks generally throughout the country. Hence, it requires no strain of judicial cognizance to say that they are not open for business before nine o'clock A. M. As the evidence discloses that the last mail, leaving Charleston for Montgomery, must have gone very soon after the banks opened in September, 1900, the forwarding of the check by that mail would have required more than ordinary diligence. A bank is entitled to a reasonable time after the commencement of business in which to perform any given duty. It cannot be expected to lay aside all other matters and give its attention to that one. "Banks would be kept in continual fever if they were obliged to send out a check the moment it was paid in." Lord Ellenborough, in *Rickford* v. *Ridge*, 2 Campb. 537. It is not a question of what it is posible for banks to do, but one of what they do, and of what the parties to the paper know to be the custom and practice of banks. Since the mail must have left Charleston between nine and ten o'clock A. M., it must have been closed at the post office very soon after the banks opened; for some time is required for the preparation of it and for carrying it from the post office to the railway station. It is highly probable that this mail closed just about the time the banks opened, and it is reasonably certain that it was closed within a few minutes after the opening of the banks. All this, the drawee of the check must be deemed to have contemplated. He was bound to know that the usual method of collecting checks is to endorse them to the banks to be forwarded by mail for presentment. Both parties, in view of their knowledge of this method of transacting such business, are deemed to have agreed to be bound by the delays incident to this mode of demanding payment. It may be said that both comtemplated the possible insolvency of the bank on which the check was drawn, or were bound to know that such a thing might happen; but the drawer, by allowing his money to remain in

that bank, and the payee, by accepting the check upon it, each evinced belief in its solvency, and the former a willingness to take the risk thereof, during the reasonable period of time, necessary for the presentation of the check, in due course of business, by the means which both parties knew the banks generally employ for that purpose.

As long ago as 1853, the supreme court of New Jersey, in *Burgess* v. *Vreeland*, 4 Zabr. 71, expressed the opinion that a mail closing at half past nine in the morning would be before usual business hours. If since that time there has been any change in this respect, it cannot be deemed to have been to the contrary of, or in conflict with, this proposition. The tendency is to limit, rather than extend, the business day in all branches of industry and commerce. A bank is not required to take advantage of a mail which closes before, or at the time of, the opening of business. In *Chick* v. *Pillsbury*, 24 Me. 458, it was expressly decided that a convenient time after the commencement of business hours of the day is allowed for the mailing of a notice of dishonor. In *Haskell* v. *Boardman*, 8 Allen (Mass.) 38, it was held that the mailing of a notice of protest at ten o'clock A. M. was not due diligence, it appearing that the only mail for that day departed at ten o'clock. It was sent by an individual to a prior endorser for the purpose of binding him. The rule in such case would be different, for the reason that there is no presumption that an individual engaged in business other than banking does not commence business at an early hour. On the contrary, it is a matter of common knowledge that merchants and traders open their places of business at an earlier hour than banks. Moreover, in this instance, the evidence shows the mail must have closed long before ten o'clock. "What is a reasonable time must depend upon circumstances and in many cases upon the time, the mode, and the place of receiving the bills, and upon the relations of the parties between whom the question arises." Dan. Neg. Inst. section 605.

That the check in this case was not actually put in course of presentment can make no difference. It is enough to make the drawer liable, that, if it had been, the time allowed

by the rule of diligence, was not sufficient. *Cox* v. *Boone*, 8 W. Va. 500.

In view of these principles the court clearly erred in giving the following instruction: "The Court instructs the Jury that if they believe the plaintiff could by due diligence have presented the check in question to the bank upon which it was drawn before it failed, it was the duty of plaintiff to do so, and if the Jury further believe the plaintiff failed to use due diligence in such respect, and its lack of diligence caused the loss of the amount of the check to the defendant, the defendant is not liable to the plaintiff for the amount of the check, but may find for the plaintiff for the sum of $22.60, Int. from Nov. 15, 1901." There was no evidence of lack of diligence. On the contrary, the evidence showed that, by the exercise of due diligence, the loss would not have been averted.

An assignment of error is predicated on the action of the court in giving the following instruction: "The Court instructs the Jury that if they believe from the evidence that W. G. Hubbard was the collector of the plaintiff and had authority to collect, agent and as such agent and collector accepted the check of the defendant, that his act in so accepting the said check was the act of the plaintiffs." This, however, is a proper instruction. It was the duty of the agent to forward the check to his principal, that delivery to him was delivery to the principal, but it must have been contemplated that he would promptly forward it, and that the time allowed for presentment would be correspondingly extended. *Rosenthal* v. *Erlicker*, 154 Pa. St. 396; *Bank of Grafton* v. *Buchannon Bank*, 80 Md. 475; *Balkwill* v. *Bridgeport &c. Co.*, 62 Ill. App. 663; *Gifford* v. *Hardell.* 88 Wis. 538.

The rejection of the following offer of evidence is also complained of: "Here plaintiff offered to prove by witness (W. G. Hubbard) that he stated to S. B. Morgan (manager of defendant) and that Morgan knew his regular course to be leaving Montgomery on Monday and go up on the C. & O. railroad and back on Friday evening on the same week to Charleston." In this, no error was committed; for the materiality of the proposed evidence was not shown. If Morgan knew of this practice, it does not follow, that he

knew the agent habitually carried checks with him over this route, delivering them to his principal on Friday. *Jackson v. Hough*, 38 W. Va. 236.

It is hardly necessary to say that, if a different state of evidence should appear on the new trial to be allowed, the rulings of the court will have to be varied so as to conform thereto. The law here declared is applicable only to the evidence in the trial which resulted in the judgment now under review.

For the reasons stated, the judgment will be reversed, the verdict set aside, a new trial allowed and the case remanded.

Reversed.

CHARLESTON

HOARD *v.* RAILROAD CO.

Submitted September 13, 1905. Decided February 20, 1906.

1. DEEDS—*Description—Certainty.*

   A deed granting to a railroad company land for its right of way must contain on its face a description of the land in itself certain, so as to be identified, or if not in itself so certain, it must give such description as, with the aid of evidence outside the deed, not contradicting it, will identify and locate the land, otherwise the deed is void for uncertainty. (p. 93.)

2. VENDOR AND VENDEE—*Executory Contract—Price—Interest.*

   A vendor selling land by executory contract stipulating that he must make a deed, and that the first payment of purchase money shall be made when he shall make a deed, and who delivers to the purchaser possession at the date of the contract, is entitled to interest on the whole purchase money, though the vendor be in default in making the deed, unless the purchaser set apart the purchase money for the vendor, and notify the vendor of his readiness to pay, and do not himself use the money. (p. 96.)

Appeal from Circuit Court, Wayne county.

Action by S. Floyd Hoard and Pitt Hoard against the Huntington & Big Sandy Railroad Company and others. Decree for plaintiffs, and defendants appeal.

Reversed.

VINSON & THOMPSON for appellants.

HOLT & DUNCAN for appellees.

BRANNON, PRESIDENT:

S. Floyd Hoard and Pitt Hoard sold to the Huntington & Big Sandy Railroad Company land for right of way for the railroad through the town of Ceredo by the following contract:

"To the Huntington & Big Sandy Railroad Company: We sell you right of way for your road through our property in Ceredo—for the sum of ten thousand dollars—to be paid one-third cash when deed is made, and the residue in one or two years thereafter, with interest on deferred payments, reserving vendor's lien in said deed to secure deferred payments. The lands herein proposed to be sold and conveyed have heretofore been agreed upon by the parties hereto, and as soon as the proper description of said property can be had we will incorporate said description, by metes and bounds, in a deed of general warranty and convey the same to you— * * * We, together with your engineer, to prepare said descriptions at the earliest practicable convenience.

You can at once begin the construction of your road over said property as aforesaid, pending the preparation of said descriptions as aforesaid. Pitt and S. Floyd Hoard.

This proposition is accepted. Huntington & Big Sandy Railroad Co. By Z. T. Vinson, *President.*"

This contract bears no date, but was in March, 1892. The railroad company at once took actual possession and built its road on the land, and has ever since occupied it with its road. The contract says that the engineers of the company and the Hoards should prepare a description of the land for incorporation in the deed from the Hoards to the company. Sometime after this contract was made an engineer on the part of the railroad company did furnish to said Hoards a map giving description to go into the deed; but the Hoards refused to agree to it. By some arrangement the control of the Huntington & Big Sandy Railroad Co. passed to the Ohio River Railroad Co., and then to the Baltimore & Ohio Railroad Co.

However, this seems immaterial. The matter rested in unsettled condition until 28th July, 1902, when the Hoards brought a suit in chancery in the circuit court of Wayne county against the said three railroad companies, to enforce the specific performance of said contract of sale, to recover

the purchase money, and to sell the said land for its payment. November 15, 1901, the Hoards prepared a form or blank deed and tendered it by mail to the Ohio River Railroad Co. Whether the Huntington & Big Sandy acted on it we do not know; but we will say that it was not accepted by that company.

No response to the tender was made to the Hoards. With the bill there was tendered a deed by the Hoards to the Huntington & Big Sandy Railroad Co. for the land. The Huntington & Big Sandy Co., and also the other companies, filed answers objecting to the deed tendered with the bill on the ground that as to one of the tracts it conveyed with only special warranty, whereas the said contract demanded general warranty; and objected to being compelled to accept the proposed deed because of its want of description of the seven parcels of land specified in it sufficiently certain and definite for the identification of the land. The court entered a decree enforcing the contract against the Huntington & Big Sandy Railroad Co., giving a decree for the purchase money, $10,000, with interest from November 15, 1901, the date when the Hoards sent the deed to the Ohio River Railroad Co.

From this decree the Huntington & Big Sandy Railroad Co. appeals.

Much law is cited to show that before equity will enforce performance of a contract that contract must be definite and certain, not only in its terms, but the contract must be certain, in a legal point of view, as to the property conveyed. *Ensminger* v. *Peterson*, 53 W. Va. 324. This is sound law; but the question before us is whether the deed tendered is certain. We are not inquiring whether the contract is sufficiently definite. No point is made as to that. But the question which we have to deal with is, whether the deed which the court forced upon the railroad company contains that definite description to which the purchaser is entitled. If there is any difference between the contract up for enforcement, and a deed of conveyance, in respect to certainty of description, the deed requires the fuller and better description. I think there is such difference. I think that the grantee has a right to a description fuller, more precise and definite, than is required in a preliminary contract. I will

add that this right-of-way land runs through a growing town, and along and near the Chesapeake & Ohio railroad, and near a trolley line. Under this situation, that is to last for all time, I think the railroad company is quite reasonable in demanding clearness and accuracy in its deed, because conflict between the town as to the streets, or between the railroad companies as to true location of rights of way, may readily arise. A railroad company having tracks running through a town, near to other railroads, has a need, greater than in ordinary cases, for accurate boundary of its right of way—different from farms. Here are no boundary trees, the whole surface of the ground occupied for this, that and the other use. The railroad is to exist forever. The men who laid it out will soon pass away. And in a few years they forget place. The evidence to show location existing at the date of the location will in a few years pass away. Then what are the parties interested either way to do? The muniment of title should be so definite that the right of way can be identified fifty or a hundred years hence. In all cases, but especially in this, there should be certainty. "The description of the premises conveyed must be sufficiently definite and certain to enable the land to be identified; otherwise it will be void for uncertainty." 2 Devlin on Deeds, section 1010. "The description should contain all the particulars necessary to clearly and accurately identify the property, such as its situation in the town and county, its boundaries, etc." 1 Jones on Conveyancing, section 320. A very essential thing in a description is the initial point, the beginning. In the deed which the decree compels the defendant to accept we find as to Tract No. 7 the following description:

"BEGINNING at a point in the west line of First street west of Main street, the center of which street is located by two stone monuments with brass or copper wire set in same, one of said monuments being in the intersection of the center lines of said First street west of Main and B streets, the other being in the center of said First street west of Main street and distant about 2184 feet southerly of the one above mentioned in center of First street west of Main street and B street, both monuments recently located by Chas. Silliman, C. E., and the first parties hereto. Said beginning point is distant thirty feet northerly from said center line of railroad,

measured at right angles from said center line; thence westerly and parallel to, and thirty feet distant from said center line of railroad," etc.

The grave question at once arises, Where is the beginning of Tract No. 7? It is on the west line of First street. At what point on that line? If the deed had located that point at a certain distance from those stone monuments, it would have been sufficient. We must not take the words "about 2184 feet" as descriptive of the beginning point of the right of way on the line of First street, because that is the distance between the two stone monuments. There is no point of beginning designated on the west line of First street; no guide to it. The description says, "said beginning point is distant thirty feet northerly from said center line of railroad"; but where is the center line? It does not mean the center line between the railroad rails; for the right of way extends thirty feet out from the center line each side. Now, the center line, like a tree or a rock, must have a point of location, so that it can be found to start from. This center line has no location. One place will suit it as well as another. One place on the west line of First street will suit for that beginning corner as well as another. There is no certainty here, no means to definitely locate either the beginning point or the center line. If a stone had been planted under the surface, for instance, we could appeal to it in years to come; but we have not that recourse. A civil engineer swears that he cannot locate the right of way of the company under this deed. It seems to us uncertain. The description of Tract No. 6 seems to be infected with the same uncertainty, if not other tracts. A plat referred to in the deed does not remove the objection. Besides, several stations, one the beginning of Tract No. 2, are left blank as to number in the deed. I am aware that Jones on Conveyancing, section 323, says that "The office of a description is not to identify the land, but to furnish the means of identification," and that it is only when it remains "a matter of conjecture what property is intended to be conveyed, after resorting to such extrinsic evidence as is admissible, that the deed will be held void for uncertainty in the description of parcels. If the description is sufficient to allow of identification by actual survey, it will be upheld, however indefinite it may seem to be. But if the

description is so vague that the parcel cannot be located under it, it is void for uncertainty. If the starting point of a boundary line cannot be identified, the deed is necessarily void." This Court has said that where a deed or other instrument contains enough to enable identification by applicable extrinsic evidence it will do. *Thorn* v. *Pharris*, 35 W. Va. 771; *Simpkins* v. *White*, 43 *Id.* 125; *Warren* v. *Syme*, 7 *Id.* 474. The description, however, must be such in the deed as is susceptible of being made definite by evidence outside of it. 88 Am. St. R. 710. The deed must refer to something of such certainty as will enable identification. *Westfall* v. *Cottrill*, 24 W. Va. 763. Now, there is nothing in this deed that will allow the application of oral evidence. What evidence will show the place of that beginning on First street that will answer for all time to come? So as to the center line. In the deed it is said that the land is "*supposed* to bind upon and follow the northerly line of the adjoining right of way now occupied by the Chesapeake and Ohio Railroad Company"; but there is no instrument or showing in the record of the definite location of the right of way of that company. The answer of the Huntington and Big Sandy Railroad Co. asks the court to make a survey of the land sold to it by the Hoards. As the parties to the contract had never fixed the description under the contract—as the contract contemplates a description satisfactory to both parties, and they had not agreed upon a description, this request for a judicial ascertainment of such boundary was reasonable and should have been granted. An order of survey would have given certainty. We think there was error in enforcing that deed upon the company.

The railroad company complains that the court compelled it to pay interest from November 15, 1901, the date when the Hoards mailed the blank deed to the Ohio River Railroad Company. The claim of the appellant is that by the contract the first payment was not to be made until delivery of a proper deed, and a proper deed has never been delivered. The court properly held that the deed filed with the bill was a non-compliance with the contract, in that it contained a special warranty as to one of the tracts. This defect, as also uncertainty of description, constitutes the argument by the appellant against the allowance of interest

from said date. On the other hand, the plaintiff filed a cross-assignment of error, claiming that the court gave them too little interest; that it should have given them interest from the date of the contract, March 9, 1892, because the Huntington and Big Sandy Railroad Co. then took possession. Under the authorities we must say that the company is liable from the date when it took possession under the contract, the date of the contract, because that contract gave the company immediate possession. Reflect that the company had the use of this land and *also* the use of the money. It never set apart the money to the use of the Hoards. It never notified them that it was ready to pay. Money is worth its interest. The clause in the contract saying that the first payment should be made on delivery of the deed was intended only to fix the date of the first payment, and had not intent actual as to interest. I know that it is a general rule that a debt does not bear interest until maturity, in the absence of express provision otherwise; but there is a peculiar rule applicable in this case, and that is, that the vendee cannot keep both land and purchase money without paying interest. If the vendee desires to escape interest on the purchase money, even when the delay in payment is caused by default of the vendor, he must actually set aside the money for the vendor, and he must not himself take its benefit, and must notify the vendor of these facts, and that the money is lying idle. *Steinrod* v. *Railroad*, 27 W. Va. 1. Say that the plaintiffs were negligent or blameful in not making a deed soon. That would not excuse the appellant from interest, because it had the use of both money and land. It did not deposit the money to the credit of the vendor in a bank, or in any way set it aside, but used it. It did not offer to pay. It did not request a deed. When the deed form which the Hoards proposed to make was sent to the Ohio River Co., the lessee of the road, whose vice president and manager was also president of the Huntington and Big Sandy Co., the deed was retained; no objection made, no response was made. The Hoards wrote to the Ohio River and Baltimore and Ohio companies, tried to settle the matter. So the evidence shows, and so is the probability, as we presume they wanted the large debt. When the description sent by the engineer was not accepted and the Hoards requested a change, it was the

duty of the companies to confer with Hoards and settle description, because the contract made it equally the duty of both sides "to prepare said description at the earliest practicable convenience." There is no evidence that the companies offered to pay and demanded a deed, or made effort to settle description. It was just as much the duty of the railroad company to furnish proper boundaries, and to confer with the Hoards as it was incumbent upon the Hoards to do the like. Under many decisions in the Virginias, as I think elsewhere generally, the company must pay interest from the time of the contract. *Brockenborough* v. *Blythe*, 3 Leigh 619; *Oliver* v. *Hallam*, 1 Grat. 298; *Bailey* v. *James*, 11 Grat. 468. The company had as full enjoyment of the land as if a deed had been made, and must pay interest.

Therefore, we reverse the decree and remand the case to the circuit court with directions to cause a survey to be made, or in some way to fix proper and sufficient description of the said land, and to enforce a specific performance of the contract after providing for a proper deed from the Hoards to the appellant company, containing proper description.

ON REHEARING.

A rehearing of this case only confirms the conclusion expressed in the above opinion. The theory of the company is, that it was first the duty of the Hoards to make a deed, and not doing so, they were in fault, and that until the deed was made there could be no interest. But was it any more the duty of the Hoards to come forward in reasonable time with a deed and ask payment, than it was the duty of the company to come forward with the money and ask a deed? One took one obligation on itself, as well as the other took another obligation. *Gas Co.* v. *Elder*, 54 W. Va. 335. Page on Contracts, Vol. 3, section 1470, says: "Concurrent covenants are those which by the terms of the contract are to be performed at the same time by each of the parties bound to perform them. Either party must be ready to perform to put the other in default. Thus under a contract for a sale of reality if no stipulation is made as to the order of time at which the deed is to be delivered and payment made, these acts are concurrent. Neither party can treat the other as being in default either for the purpose of con-

sidering the contract as discharged, or for bringing an action for damages." Waterman on Specific Performances, section 444 says: "When one is to pay money, and the other is to give a conveyance, no time fixed, and no provision that either shall be done first, the covenants being mutual and dependent, one is not bound to pay without receiving his conveyance, nor the other to part with his land without receiving his money." In section 448: "In this country, the prevailing practice is, that the vendor shall prepare the deed, and have it ready when called for. This would seem to be the obvious meaning of the parties when the seller covenants that he will convey the title to the purchaser." In that great friend of the lawyer, American and English Encyclopedia of Law, (2d Ed.), Vol. 29, 689, the law is thus stated: "Dependent unless contrary intention appears. The general rule is to consider all covenants dependent, in the absence of a contrary intention, for this is the way most men make their bargains, neither party intending to perform unless the other at the same time performs on his part. And the same is held when no time is fixed for performance by either. When it appears that the acts are to be performed at the same time, the covenants are considered mutual and dependent. Ever since the time of the famous note of Sergeant Williams to the case of *Pordage* v. *Cole*, it has been very generally held that when a time is fixed for performance on one side, and the performance on the other side is to, or may, happen after such time, the covenants are independent." Now, how are the Hoards more in default than the company? In fact, this position is fortified by adding that the contract made it the duty of the company to participate in the preparation of the deed by meeting the Hoards and agreeing upon a material part of the deed, the specification of the boundaries. And as the Hoards expressed dissent in the description by the engineer, it was then the company's duty to confer with the Hoards; but it did not do so, made no effort to agree year after year. So the company was in default. But say that neither side was in default. A court of equity finds that the parties contemplated interest after a reasonable time, as they must be taken to have contemplated completion of the contract in a reasonable time; but owing to mutual neglect it was not so completed. The

long delay was not in the contemplation of either side. The railroad company is in just as full and beneficial possession as if a deed had been made the next day after the contract, and it has the use of the money justly belonging to the Hoards. What shall a court of equity do in this state of things? If it lets the purchaser through so many years keep both the land and money, without interest, it participates in that which is unjust and against good conscience. The *Steenrod case*, 27 W. Va. 1, makes this a case of dependent and mutual covenants, and compels us to make the railroad company pay interest. In *Oliver* v. *Hallman*, 1 Grat. 298, the receipt for part payment for the land said, "Which I bind myself, my heirs to make to said Wade a good and lawful title to before I call on him for any further payment", and yet the decision made the purchaser pay interest from the date of purchase. Why? Because the purchaser had the use of both land and money. The cases there cited will sustain that decision. Pomeroy on Contracts, section 428, says: "If the vendor is in fault and delays to convey legal title, the vendee does not generally lose anything substantial by delay; he has the possession all the time, and the rents and profits, and it is right and fair that he should pay interest on the purchase money until the whole is paid up." In section 429, "The general rule is well settled that, where the contract is not completed until after the time stipulated for that purpose, but the court nevertheless decrees a specific performance, it will adjust the equities of the parties by placing them as far as possible in the same position which they would have occupied had the agreement been completed at the prescribed day, and to that end it will allow to the purchaser the rents and profits, and to the vendor interest upon the purchase-price from and after that date." Law found in 29 Am. & Eng. Ency. L., (2d Ed.), 709, will speak the same. Here it happened that the contract was not executed as it meant, or within the time, and on principles of equity and law, it is just to charge interest from the date of contract. I say again the contract contemplated interest. The parties did not complete the contract as they expected. We cannot rescind. Neither side asks it, and rescission would be disastrous to the railroad company. A court of equity must take things as it finds them, and do equity, which is, upon a great vol-

ume of authority, nowhere stronger than in the two Virginias, to call upon the railroad company to pay interest for the use of money justly belonging to the Hoards.

We therefore repeat the decree heretofore made, reversing the decree and remanding the cause for further proceedings in accordance with principles stated in the former and this opinion.

Reversed.

SANDERS, JUDGE, (*dissenting in part.*)

I concur in the decision of this cause, in so far as it reverses the decree of the circuit court, and remands the cause, on the ground that the description in the deed tendered is insufficient, but I cannot agree to that part of the decision which requires the company to pay interest on the purchase money from the time it entered into possession of the property under the contract. I might almost say that for the reason I am willing that the decree shall be reversed, on account of the insufficiency of description, for the same reason I am unwilling to concur in the other point decided, for it seems to me anomalous to say that under the circumstances of this cause, the grantors, although they have not shown themselves entitled to decree for the purchase money because they have not tendered a proper deed, yet that they are entitled to interest on the purchase money from the date of the contract, because at that time the company took possession. I realize full well the force of the position taken in the opinion of the Court, that the general rule is that a vendee is entitled to interest from the time possession is taken of the premises by the vendor, but this rule is subject to exceptions, which are as firmly imbedded in the law as the rule itself, and from an examination of the authorities relied upon to support it, it will be seen that in no case in which this doctrine is announced, has the court had before it a contract such as is here presented. In none of them had the parties stipulated as to the payment of interest, but the vendor had been in default as to the payment of the principal, and the court attached interest as a matter of equity in the absence of such stipulation. This differentiation runs through all the cases. The contract, in this respect, is as follows: "We (the plaintiffs) sell you right of way for your road through our property

in Ceredo for the sum of ten thousand dollars, to be paid one-third cash when deed is made, and the residue in one and two years thereafter, with interest on deferred payments. * * * We will incorporate said description by metes and bounds in a deed of general warranty and convey the same to you." Here the contract is express. From its terms it is clear that no payment was due until the deed was made. The balance of the purchase money was then to be paid in one and two years, and interest was payable upon the deferred installments. Hence, it seems to me, it cannot be contended, the parties having thus stipulated as to when interest should be payable, that the plaintiffs should not be required to comply with their contract before being placed in a position to demand interest. The making of the deed and performance of the contract is made a condition precedent to the right to demand the cash payment.

Nor does the case of *Steenrod's Adm'r* v. *R. R. Co.*, 27 W. Va., when applied to the circumstances here, support the position taken. The fifth point of the syllabus is: "The general rule in ordinary contracts for the sale of land, which contain no stipulation for interest and do not specify any day for completion, is that the purchaser is liable for interest on the purchase money from the time he takes possession, especially if he has received rents and profits." And the court says, showing that it was, in that case, the duty of the vendee to tender the money before being entitled to a deed, "Referring to the agreement we find that it provides that on payment of the damages the vendor agrees to convey the land on reasonable demand." The court also says: "The contract is that the payment is to precede the conveyance, and the latter is to be made only upon reasonable demand after the payment." Very different is this case. The rule is well stated in *Jourolman* v. *Ewing*, 80 Fed. Rep. 608: "But the question of interest in case of suit brought upon a contract wherein the payment of interest is made the subject of express stipulation, and is thereby made a part of the obligation, stands upon a different ground. In such case it is made a matter of agreement between the parties. They are supposed to have considered all the circumstances bearing upon the propriety of their stipulation, and this term of the contract is as binding as any other. The courts have no right

or authority to annul the agreement which the parties have, in contemplation of the circumstances in which they were dealing, seen fit to make. * * * The court has no more right to disregard the agreement upon the subject of interest than it would have to abate a part of the principal debt if the facts had been proven which showed that the price paid for the land was improvident."

In *Mayo* v. *Purcell*, 3 Munf. 241, the court held that a purchaser of land being thoroughly informed of defects in a vendor's title, and agreeing nevertheless to pay interest on the purchase money from a certain day, would not be relieved from paying such interest, on the ground that he could not get possession of a part of the land, which he knew at the time of entering into the agreement, was held by another person.

In *Hepburn* v. *Dunlop*, 1 Wheat. 179, the vendor was indebted to the vendee, and the sale was made to pay the debt. This was in 1799, but a good title was not made to the vendee till 1809. The court held that the vendor must pay interest on the debt till that time; in other words, the purchaser paid no interest till he got a good title.

In *Lofland* v. *Maull*, 1 Del. Ch. 359, by a contract for the sale of land, the purchase money was made payable in future installments, and there was no stipulation in the contract as to the time for the delivery of the possession of the land. After the sale, and before all the installments had become due, the purchaser, with the vendor's consent, entered into possession. It was held that he did not thereby become chargeable with interest on the unpaid purchase money from the date of such possession, in the absence of a stipulation to that effect in the contract of sale.

In *Birdsall* v. *Waldron*, 2 Edw. Ch. R. 15, the Vice Chancellor decided that the seller, although in possession, would not be bound to pay his money into court before obtaining a title, where he went into possession with the understanding that he was not to pay it until he had a title. And it was also said that if there had been delay in the performance, without the default of the purchaser, he would not, although in possession, be obliged to pay the purchase money.

In *Blount* v. *Blount*, 3 Atk. 636, it is said that neither in the purchase of an estate in possession, or in reversion,

whether purchased under a private agreement or purchased under a decree of sale, can it be laid down for certain that from the time of possession, a purchaser shall pay interest; that the court, in awarding interest, never regards the execution of articles for a purchase, but the time of the execution of the conveyance. and even then the purchaser shall pay interest only from the time possession is delivered.

"The law creates an obligation to pay interest, only where the debtor is put in default for the payment of the principal; and in such a case it runs only from the default." *Reid* v. *Duncan*, 1 La. Ann. 265. See, also, *Withworth* v. *Hart*, 22 Ala. 343; *Gay* v. *Gardner*, 54 Me. 477; *Hubbard* v. *Charleston*, &c., R. R. 11 Metc. (Mass.) 124.

Except where the parties themselves have failed to provide for the payment of interest in the contract, no court has pretended to fix an interest charge. And in the cases in which a purchaser has been held to pay interest, there was either no contract, or the purchase money had become due. Here the purchase money did not become due until the title was made. The parties expressly stipulated that only the deferred payments should bear interest.

The second point of the syllabus of the opinion makes no reference to that part of the contract which provides that interest shall be paid upon the deferred installments of purchase money. This provision is a material one, and cannot be done away with by ignoring and not considering it. But in the opinion it is said, "That clause of the contract saying that the first payment should be made on the delivery of the deed was intended to define the date of the first payment, and had not intent actual as to the interest." This might be so, if nothing else was said, but if it had not such intent, why add, after providing that the first payment should be made on execution of the deed, "residue in one and two years, with interest on the deferred payments?" If it was not the intention that only the deferred installments should bear interest, and then only after the delivery of the deed and making of the first payment, why say so in language that is unmistakable? The same clause that fixes the time of the first payment as of the delivery of the deed, expressly says that the deferred payments shall bear interest. Certainly it cannot be said that the parties have not the right to agree as to

the date from which interest shall be computed, yet the Court, in its opinion, conveniently gets rid of the provision in regard to interest by ignoring it.

While I do not concede the correctness of the theory advanced in the opinion filed on rehearing, that the covenants were dependent, and that it was as much the duty of the company to demand a deed as it was the duty of the Hoards to make and tender it, yet, on February 16, 1893, the engineer of the company prepared a map and forwarded it to S. Floyd Hoard, with the following letter of transmittal: "Enclosed find map with right of way put on and colored. This will give sufficient data for description I think. I hope you will prepare it and send to Vinson to incorporate in deed as soon as possible." After receiving this map, was it not the duty of Hoards to prepare and forward description, as requested? Had not the railroad company done all that was required of it, under the terms of the contract, granting that it was its duty to prepare description? Not having complied with the request of the engineer, and not having made any pretense of tendering a deed until the lapse of so long a time, the plaintiffs are not in a position to make the demand they are now making. By thus early complying with the provision of the contract, requiring them to co-operate in the preparation of the deed, even if it could be so construed as to make it the duty of the company to co-operate, the duty to complete the transaction was cast upon the Hoards. This they never did, nor pretended to do, until 1901, when they tendered a deed which contained a description of their own making, to which the engineer of the company refused to agree, and which he had no hand in preparing, and expressly testifies that the description offered by the plaintiffs is such that it is impossible to locate the land conveyed upon the ground under it, and the Court, in its opinion, finds that this is so, and that the land cannot be sufficiently identified. It is said that the delay was not contemplated by the parties. Possibly so. But who must suffer for the delay? Certainly the railroad company should not be made to do so, after having prepared and forwarded description, with the request that it be mailed to its attorney.

Viewed in the light of all the circumstances surrounding

this case, I cannot agree that the plaintiffs are entitled to interest, until they have, by the tender of a proper deed, placed themselves in a position to demand payment of the purchase money.

CHARLESTON

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REEL *v.* REEL.

Submitted September 15, 1905. Decided February 20, 1906.

1. TRUSTS—*Resulting Trusts.*
   One taking a deed for land knowing that another has a valid equitable title to the same land from the same vendor is held in equity as holding the legal title in trust for the benefit of the first purchaser, and equity will compel him to pass the legal title to such first purchaser. (p. 109.)

2. SPECIFIC PERFORMANCE—*Oral Contract as to Land.*
   An oral contract by a father to convey land to his son in consideration that he shall support the father, is not enforceable in equity, unless the possession has been transferred to the son under the contract. (p. 110.)

3. DEED—*Delivery.*
   Though the grantor tender to the grantee a deed with intent to deliver it, yet if the grantee refuse to accept it, it is not a perfected deed, and passes no title. (p. 111.)

Appeal from Circuit Court, Randolph County.

Bill by James Reel against William C. Reel and others. Decree for plaintiff, and defendants appeal.

Reversed.

BENT & SPEARS, for appellants.

TALBOTT & HOOVER, for appellee.

BRANNON, JUDGE:

James Reel filed a bill in equity in the circuit court of Randolph county against William C. Reel and Andrew Fansler, setting up that he was over fifty-one years of age and until the winter of 1903 had lived with his father and mother on the farm; that his mother was dead, and one of two sisters was dead, and the other was the wife of Andrew

Fansler; that the daughters, upon marriage, had left home, but he remained; that when twenty-one he told his father that he was going away from home to earn money for himself; that his father told him that he was his only son, and if he would remain at home with his father and mother and aid in supporting and caring for them, he would give all the lands he might own at his death to him, James Reel; that he and his father made a definite agreement to that effect, the father agreeing to convey the lands to him at his death; that in execution of the agreement he remained at home with his father and mother, and worked on the farm with his father, clearing land, cropping the land, building a house on it for the family, paying the taxes, and sometimes working elsewhere for wages, and devoting his earnings to the support of the family; that his father in the execution of said agreement went to Amos Canfield and had him to draw a deed conveying two tracts of land, one of thirty-one and one-half acres, the other fifty-six acres, to said James Reel, and signed and acknowledged it; that his father brought the deed home, and informed the plaintiff that he had placed said deed in a chest or drawer, and told plaintiff to take it and have it recorded, but as plaintiff seldom went to the county seat he left the deed where his father had placed it; that afterwards, 1st September, 1902, his father had conveyed to Andrew Fansler the same tracts in consideration of support and maintenance during life: that the deed was made and put on record, without the knowledge of the plaintiff; that Fansler was fully informed through years of the said agreement between William C. Reel and the plaintiff, and when he took the deed Fansler knew that William C. Reel had made the deed to the plaintiff, and had delivered it to him, though it had never been in the hands of the plaintiff or put on record; that Fansler had moved on the farm, driven plaintiff away, and was living on the farm with William C. Reel; that Fansler had fraudulently and corruptly induced William C. Reel to make the deed to him. The bill claims that the placing of the deed in the drawer was in law a delivery of it, and it sought to compel the defendants to surrender it to him, if in their possession, and if not, to compel them to convey the land to the plaintiff reserving a lien for the father's support; and if that could not be done, that the lands be

charged with $1,000 compensation for work and labor done and money spent by James Reel for his father, as a judgment for it would be unavailing against his father, as he was insolvent. William C. Reel and Fansler demurred to the bill for want of equity jurisdiction, and answered denying that James Reel had supported him. William C. Reel admitted that for a short time prior to the year 1900 he did propose to make his son a deed for the land in consideration of support of himself and his wife, and that for a time James Reel agreed to the proposition, and it was a mutual understanding that such deed would be made; but the answer averred that finally the plaintiff refused to accept any such deed for the support and maintenance of his father and mother. The answer stated that James Reel simply lived at home sharing in the product of the little farm along with other members of the family, until about the year 1900, when he, the father, did agree to convey to the son the land in consideration of such maintenance, but the son refused to consumate the agreement. The answer admits that on the 19th, January, 1900, William C. Reel did sign and acknowledge a deed whereby he intended to convey to his son the land; that he informed his son that he had made the deed and offered it to him, and his son declined to accept it, and never did accept it, and authorized his father to convey the land to Fansler, and authorized him to make the deed to Fansler which he did make. Fansler admits that when he took the deed for the land he was aware of the existence of the said deed to James Reel; but that before the deed was made to him, Fansler, James Reel had declined to accept said deed, had declined to assume the obligation of supporting his father and mother, and that James Reel got possession of the said deed from his father to him, and delivered it to Fansler, and urged him to undertake the support of his father and mother, and after hesitation, he, Fansler, agreed to do so, and accepted a deed for the land, which was executed with the full knowledge and consent of James Reel; that he took possession under this deed, paid back taxes on the land, and ever since had been complying with his obligation to support William C. Reel. Fansler filed the said deed to James Reel from his father, it being in his possession. A decree in the case declared that the deed from William C. Reel to James Reel had been delivered to

James Reel, and the deed being filed in the papers, it was decreed that the legal title to the land was in James Reel, and gave him leave to withdraw said deed and place it on record. The deed to Fansler was canceled as in fraud of the right of James Reel. William C. Reel and Fansler appeal.

Equity jurisdiction is denied because, on the theory of the bill, that the deed to James Reel was perfected by delivery, he could sue in ejectment, and being out of possession must sue at law and not in equity to remove a cloud, citing *Smith* v. *O'Keefe*, 43 W. Va. 172. If we held that the deed to James Reel was consummated by delivery, we must needs decide the question whether one holding legal title out of possession can sue in equity to remove a cloud arising from a second deed by the same grantor, taken with knowledge of the first; but we are of the opinion said deed was not perfected by delivery, which is an indispensable element in the elementary definition of a deed. Therefore, we have a suit in equity by one claiming to have first an oral contract for the conveyance of land by a father to a son on consideration of work and labor at home for the support of the father and his family, and then the contract evidenced by a deed executed in all respects except by delivery, and the bill seeking enforcement of such contract as against the father, or the right to enforce involved in the suit as a necessary element and seeking to annul a deed accepted by another person from the same vendor for the same land, with notice of the right of him claiming under such contract, and seeking its cancellation, or to compel him to pass the legal title by deed. I suppose it would be immaterial whether a decree of relief be to enforce the contract by compelling a deed from the father and cancelling the deed to Fansler, or compelling Fansler to pass the legal title to James Reel—the latter being the more usual mode of decree, simply treating him as holding title as a *quasi* trustee for James Reel. Surely, this state of facts presents a case of equity jurisdiction of frequent occurrence. Equity follows the legal title into the hands of its fraudulent holder, and makes him hold that title as held in trust, and compels him to execute the trust by conveyance. *Davis* v. *Settler*, 43 W. Va. 17. He takes the shoes of the vendor, and equity will make him do what it would have made the vendor do. 1 Beach, Mod.Eq. section 346; 2 Pomeroy, Eq.,

3 Ed., section 591. It is a clear case of jurisdiction in equity.

Though I think it contrary to the weight of authority, yet under *Bowles* v. *Woodson*, 6 Grat. 78, and *Parrill* v. *McKinley*, 9 *Id.* 1, the undelivered deed would be good as a memorandum to answer the demand of the statute of frauds that a contract for sale of land be in writing, and we would have to say whether the mere oral contract would be enough. For myself I do not see why it is not just as requisite that the memorandum of the sale contract be delivered as that a deed be, and so I think say the authorities. But I concede that these cases eliminate the question of a writing. As we find that James Reel refused to accept the deed, repudiated it, it might be said that he would fall back on his oral contract. No, because refusing to support his father, renouncing the contract, authorizing Fansler to assume the burden of his father's support, and take a conveyance, would operate to repudiate also the oral contract, and estop James Reel from claiming against Fansler. I am, however, free to say, that the oral agreement is not enforceable by specific performance, as it was not executed by a transfer of possession. There was no change as to possession. The contract was not to take effect by possession until the father's death. The father remained in possession. *Harrison* v. *Harrison*, 36 W. Va. 556; *Ratliff* v. *Somers*, 55 W. Va. 30. As the oral contract is not good, James Reel can have no right as against his father. Nor can he against Fansler, so far as that oral contract goes; for there was nothing in it, no vested right under it, with which to affect Fansler with notice. *Central Land Co.* v. *Laidley*, 32 W. Va. 134.

A deciding question in the case is, Was that deed delivered to James Reel? If so, it passed title, though not recorded, and Fansler having notice of it, would take no title by his deed. On the other hand, if that deed was not delivered, James Reel got no title, and Fansler took good title. This turns on evidence, and we cannot, ought not, enter into details. The father seems to be an intelligent, plain country man, of seventy-eight years. He swears that he talked several years of deeding the land to his son, and had a deed drawn and acknowledged, brought it home and said, "Says I to Jim here is the deed, and patted my hand on the deed, and says I it is no account to you till you take it and get it record-

ed. Says he I don't want the deed,—swore he wouldn't have it." He repeats several times that the son declined to accept the deed, and cursed and abused him for making it. He swears that his son told him to convey the land to Fansler. He adds, "Says I to Jim if I make a deed to Fansler, says I, if I do this now the very first time you get out of humor, you will swear that I have no right to make it to him, and it was against his orders, and you get the least bit mad you will be for killing me, and may be will do it." This is the old man's statement reiterated in several forms during his examination. Fansler, Sallie Courtney and Sarah Wood were present and heard the conversation and pointedly confirm him. All four say he repeated at different times this refusal to accept the deed. All say that when the father and Fansler were about to start to Elkins to have the deed to Fansler written, James delivered his deed to Fansler, and consented to his father conveying the land to Fansler; and that when they returned in the evening with the deed he was informed that the deed had been made to Fansler, and approved it. He waited fifteen months before suing. It is argued that it is unreasonable to say that James Reel at the age of fifty-one would thus relinquish his life long home. Not so when we reflect that his father was an aged man, his power to labor gone, frail of body, somewhat fretful, and the son himself without means, coming to an age when his own power to labor was decreasing, he childless and wifeless. Who would perform the arduous housework which the assumption of this heavy burden of supporting his father, perhaps for many years in the feebleness of old age, would impose? Quite reasonable that James Reel would prefer that Fansler and his wife, the old man's daughter, should bear this heavy burden. James talked about going elsewhere. If he should do so, how could he take care of his father? As a matter of law, if the old man did deposit the deed in a chest giving leave to James to take it, that would be clear delivery; if he retained power and dominion over it, it was not. *Ward* v. *Ward*, 43 W. Va. 1; *Gaines* v. *Keener*, 48 *Id.* 56; *Adams* v. *Baker*, 50 *Id.* 249. But in this case, there was refusal to accept, a disaffirmance. It requires not only deliverance by the grantor to make a deed, but acceptance by the grantee. No matter how distinct the offer or words of delivery on the grantor's part,

if the deed is refused by the grantee, there is no deed. *Guggenheimer* v. *Lockridge*, 39 W. Va. 457. When a deed is for one's benefit, there is a presumption of acceptance, but why speak of that in the face of express rejection? James Reel's version is different, but inconsistent and unreasonable. He says that when his father brought his deed home he did not tell him it was a deed, but said "it was a little script of paper and put it in the chest. I never seen it. He said to take it and put in the clerk's office. I can neither read nor write." How unreasonable! Is it probable his father would call it a "script" of paper? And is it reasonable that James Reel could believe it to be a script of paper when his father told him to take it to the clerk's office? But his bill does not hint that his father called it "a script," as it pointedly says that his father got Canfield to write "a deed conveying to plaintiff the thirty-one and one-half acres and fifty-six acres of land, and after the deed was written it was signed by William C. Reel, acknowledged, and said Reel brought the deed from the residence of said Canfield to the residence of said Reel, and when he came home he informed plaintiff that he had placed said deed in a chest and told plaintiff to take it and have it placed on record." Utterly inconsistent with his statement that he did not know it was a deed. He admits that Canfield told him that it was a deed for the land. He told Eevertt that his father had made him a deed. Also he told Canfield that his father had so informed him. All this shows that he knew it was a deed. And he pointedly swears as to that paper, that he did *not accept* it. The defense in volume and force of testimony has the better of the case greatly. Therefore, the deed in question never took effect.

As to the claim for a lien on the land for work and labor, I know of no law to create it, none is shown.

Decree reversed and bill dismissed.

Reversed and Dismissed.

CHARLESTON

WADE v. MCDOUGLE.

59 113
59 674
59 676

Submitted January 12, 1906. Decided February 20, 1906.

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64 24
64 658

1. EJECTMENT—*Right of Recovery.*

A plaintiff in ejectment must locate his own land and recover upon his own title, and the fact that the defendant's land does not cover the land in dispute or lie where the defendant claims it to lie, or that his title is not good, is immaterial and irrelevant. (p. 115.)

2. ADVERSE POSSESSION—*Color of Title—Evidence—Commissioner's Deed.*

A deed from a special commissioner purporting to be made under authority of a decree is admissible in evidence to give color of title for adverse possession, though such decree is not shown. (p. 116.)

3. EVIDENCE—*Statement of Third Person.*

Statements by a person cutting timber on land or cultivating it, that he is so doing under authority of a certain person as owner, made while so doing, are admissible when the question of possession by such owner is involved. (p. 118.)

4. EJECTMENT—*Judgment, effect of.*

A verdict and judgment in ejectment by which the plaintiff recovers land in fee, of their own force, vests title in him, and take title, from the defendant, if he had any. (p. 118.)

5. SAME—*Boundary Lines.*

A verdict and judgment in ejectment fixing a line are final and conclusive between the parties and their privies in estate as to the location of such line. (p. 119.)

6. SAME—*Judgment, effect of—Adverse Possession.*

A verdict and judgment in ejectment by which the plaintiff recovers the contested land destroy all title in the defendant at the date of the judgment. The defendant, by adverse possession beginning after judgment, may acquire title, but possession prior to the judgment cannot be considered. (p. 120.)

7. BOUNDARIES—*Agreed Line—Validity of Agreement.*

To make valid an oral agreement to fix a line between two contiguous tracts of land there must be doubt and uncertainty as to the true place of the line, else the agreement is void, Where there is in fact, such doubt and uncertainty, such oral agreement, if at once carried into execution by actual possession, is valid without other consideration than the settlement of disputed boundary. (p. 122.)

8. SAME—*Possession.*

A mutual express agreement between adjoining owners fixing their dividing line is of no force, unless actually executed immediately by taking possession actual up to it. (p. 122.)

9. COMPROMISE—*Offer—Effect.*

A person is not bound by an admission in an offer to compromise not accepted by the other party. (p. 123.)

10. EVIDENCE—*Admissions as to Title.*

Where legal title to land is vested in one his mere oral disclaimer or admission of no title cannot devest his title. It binds him not. (p. 123.)

11. BOUNDARIES—*Possession—Establishment of Boundary by Acquiescence.*

To establish a line between adjoining owners, in absence of express agreement fixing it, by acquiescence and recognition, there must be possession actual up to it by the party claiming the benefit of the line at least for a time prescribed by the statute of limitation, with acquiescence and recognition of such line by the other party, he knowing of such claim by his adversary. (p. 124.)

12. ADVERSE POSSESSION.

Mere occasional grazing cattle or cutting timber or sod on land does not constitute adverse possession under the statute of limitations. (p. 124.)

13. SAME—*Inclosure.*

Actual inclosure by fence is not indispensable for adverse possession under the statute of limitations. It is sufficient if the possession be marked or held by inclosure by fence, by cultivation, residence, clearing, or any plainly visible and notorious manifestation of sole, exclusive possession, according to the nature of the case. (p. 126.)

14. SAME—*Color of Title—Possession.*

Where there is no color of title, possession, for the purpose of adverse possession, is confined to the land in actual, open, notorious, exclusive occupation by inclosure by fences, residence, clearing, cultivation or such other act, notorious and open, according to the nature of the case, telling the world of adverse possession under his own claim. (p. 128.)

Error to Circuit Court, Wood County.

Action by C. A. Wade, as sheriff, against A. H. McDougle. There was judgment for plaintiff, and defendant brings error.

Reversed.

H. P. CAMDEN, for plaintiff in error.

MERRICK & SMITH, for defendant in error.

BRANNON, JUDGE:

Daniel R. Neal brought an action in ejectment in the circuit court of Wood county against A. H. McDougle counting in

his declaration for a tract of sixty acres. A disclaimer was made by the defendant for all of the tract except a parcel of specified boundary containing about fifteen acres. A trial resulted in a verdict and judgment for the plaintiff.

Defendant's first assignment of error is, that the plaintiff was allowed to prove a survey, made under an order of survey in the case, of the land covered by defendant's deed. The plaintiff claimed that the deed under which the defendant claimed does not include the land in contest. The plaintiff introduced a deed for the sixty acres dated 1st February, 1867, from William Logan to Daniel R. Neal, under which the plaintiff claimed, but traced no title back to the state. On the strength of paper title, the plaintiff showed no title; for to recover on paper as *per se* giving superior title, it must trace back to the state, unless the title of the contestants comes from a common grantor. *Ronk* v. *Higginbotham*, 54 W. Va. 137. No show to recovery by the plaintiff on paper title was made in this case. The plaintiff did not even give evidence of the boundaries of the Logan deed to show that it covers the land in controversy. If the plaintiff showed no title in himself, what matters it where the land embraced within the defendant's deed lies? In ejectment the plaintiff must, if he claims under paper title, locate his exterior boundary, so as to show that his title takes in the disputed land. *Miller* v. *Holt*, 47 W. Va. 12. What matters it whether the defendant has title or not, if the plaintiff himself has no title? He must gain on the strength of his own title, not on the weakness of the defendant's title. *Lowe* v. *Settle*,, 32 W. Va. 600. Thus, it would seem that this evidence of the defendant's location would be immaterial, and introduce a matter, and call on the defendant to meet it, not pertinent to the case, and calculated to hurt his defence before the jury. It could not locate the plaintiff's land, as he had no title to locate. If it is said that to locate the defendant's deed would locate the Logan deed, as the Logan deed calls for the "Neal and Stokely line", the reply is, the Logan deed is not surveyed, and the deed to Beckwith does not call for the line.

A second assignment of error is, the admission of evidence of surveying a line between a tract owned by the city, known as the city hospital ground, and a tract of Sarah Neal. I do

not see what light this could throw on the case. It could add to the intricacy and difficulty of the case and confuse the jury. It was not relevant. Neither claimed under or derived title from the owners of those tracts. Their location would not settle the location of the claims of the plaintiff or defendant. The call in a deed to which the Lauch deed referred for the Neal line was not binding on the defendant; it was *res inter alios acta.*

A third assignment of error is, that plaintiff gave evidence to prove that defendant's deed would not reach the disputed land, is well taken under principles stated above, that the plaintiff must show that his own right covered the land. And mere call for distance is not material when a fixed line is called for.

A fourth assignment of error is, the admission of a deed from Taylor, commissioner, to Sanders, no authority to make it being shown, and no connection being shown between the title of one Davis, whose title the deed purports to convey, and the plaintiff. As passing title it was not admissible; but the plaintiff after giving that deed in evidence, gave in evidence a deed from said Sanders to William Logan, and a deed from Logan to the plaintiff. As color of title for adverse possession, I see no objection to the deed. *Mullin* v. *Carper*, 37 W. Va. 215.

A fifth assignment of error is, the admission in evidence of a deed from Sanders to Logan. It is admissible for color of title in connection with the deed from Logan to plaintiff. It is said the descriptions in the two deeds vary. If it were plain that they relate to different land, this would be a good objection; but that seems to me to be a question of identity as a fact for the jury; that is, whether it could give any color as to the land in contest. The fact that no surveying was don eto show the location of the land described in the deed only went to make it weak as affording color of title for the land.

The sixth assignment of error is, the admission in evidence of a deed from Lauck and Logan to Logan and Leach. It is not claimed that the plaintiff claimed the land in this deed, or had any privity with it, or that it bounded on the land conveyed to him by Logan. It was in no sense in controversy. It was irrelevant, producing confusion before the

jury. The argument for it is that Logan's deed to the plaintiff refers to this deed, and this deed calls for the Neal and Stokely line. What if it does? Is it used to locate that line? It cannot do so. It is a declaration by its parties that that line was there; but does their declaration or assertion bind the defendant? No surveying of its bounds proves that declaration true.

The seventh assignment of error is, in the admission in evidence of a deed from Logan and Leach to Parkersburg. What has been said under the sixth assignment here applies.

The eighth assignment of error is, the admission in evidence of a decree of partition and plat of lands of Bradford's estate. They were transactions between strangers to this suit, not involving the land in dispute. It is claimed that these papers are admissable, as Beckwith's deed, under which defendant claims, calls for this Bradford land. That would tend to locate the land of defendant; but the plaintiff is suing, and must show where his land is, no matter where may be the defendant's. Possibly, if the plaintiff had had his tract under the deed from Logan to him surveyed and proven, his right to go to a line the same as the line of Bradford, the call in Beckwith's deed might be an admission of the location of Beckwith's line; this is doubtful, because the defendant was not a party to the partition, so as to give it force to establish the true place of the Bradford line. Surely the action of parties to the partition of the Bradford land could not fix its bounds so as to bind Beckwith to a particular line as being the true place of that line called for in his deed. It is *res inter alios acta*. Action of one party does not bind strangers. But this Bradford land was not surveyed, but laid down by protraction. Where are its lines on the ground? I do not see that the Bradford land can locate the defendant's land. Would that show that the defendant's land is in a particular place? It is an effort, by the partition of other people's land, not in controversy here, to show that the defendant does not own the land in controversy, without showing that the plaintiff owns it. This partition has no connection with this suit.

The ninth assignment of error is, the admission in evidence of a deed from Phelps to Bradford. What does it show shedding light on this case? It is between strangers to it.

Can their acts locate the land involved? No survey of the land mentioned in that deed gave it local habitation, as may be also said of other papers admitted, even of the deed of Logan to the plaintiff. It does not purport to, and could not, locate the plaintiff's boundary. Not every paper can be introduced in ejectment. Irrelevant ones cannot be.

The tenth assignment of error is, that witness McConnell was allowed for the plaintiff to prove that Crummitt and Leary, whom he saw cutting timber and sod and cultivating, told him they were doing so under Neal. They were on the ground when so stating. Declarations of one in possession explanatory of the character of his possession—that is, how he claimed, under whom, are admissible. They are part of the act of possession, part of *res gestæ*. Cannot a tenant admit that he holds under a certain person? *High* v. *Pancake*, 42 W. Va. 602; 24 Am. & Eng. Ency. L., (2d Ed.), 688-9-90; note to *Marcy* v. *Stone*, 54 Am. Dec. 74; *Leger* v. *Doyle*, 70 *Id.* 240.

The eleventh assignment of error involves principles important in the case. It is the giving of an instruction to the effect that if Logan, at the date of his deed to the plaintiff Neal, February 1, 1867, had been prior to that date, and claiming under the deed from Sanders to Logan, in actual possession for ten years of any part of the land in controversy in this suit, and the deed to Neal included the land in controversy, and the defendant during said period did not have actual possession of any portion of the land in controversy, then Logan acquired a good title to the land in controversy, and by his deed conveyed the same to Neal. Conceding, as the plaintiff must, and practically does, that he showed no title by documents, his claim is that his title became perfect under the statute of limitations. Let us suppose that Logan had, and by his deed conveyed to Neal, good title so acquired. As will appear from the report of the case of *Beckwith* v. *Thompson*, 18 W. Va. 103, in 1871 Beckwith brought an ejectment against Thompson and others to recover a tract of land of two hundred and twenty-five acres, which resulted in a verdict and judgment for Beckwith, affirmed by this Court 14th May, 1881. It was claimed in that suit by its defendants that the two surveys below mentioned did not adjoin on their first two lines, but that

there was vacant land between them, which was patented and claimed by defendants. Thus the case involved that question, and if adjoining, the question, Where is the Neal-Stokely line? Beckwith, the plaintiff in that suit, is the same person whose title vested in McDougle, as executor with his will annexed, defendant in the present suit, and Neal, a defendant in that former suit, is the same person who was plaintiff in this suit, and whose title vested in Wade as executor with his will annexed, the plaintiff by revival in the present suit. Neal claimed derivatively under a grant from Virginia to James Neal, dating 14th September, 1785, for four hundred acres, beginning at a sugar standing on the bank of the Ohio, and running S. 24 E. 117 perches, S. 39 W. 243 perches. Beckwith claimed derivatively under a grant from Virginia for twelve hundred acres, dating 9th May, 1804, to John Stokely, "beginning at a sugar tree, corner to James Neal's survey, a small distance from the mouth of the Little Kanawha river, and on the bank of the Ohio river, running thence with two of his lines, South 24 E. 117 poles to a white oak; S. 39 W. 243 poles to a black oak" etc. The controversy in the present case is as to land on the second line dividing these adjoining old surveys. The jury in the former case fixed both lines. It ran them from C to D and from D to E on the plat of surveyor Farrow made under an order or survey in that case and used on its trial. Where is that line D E? Wherever it is it is a finality to fix that line between Neal and Beckwith and those claiming under them, binding on the parties to this case. Neal claims that it was fixed wrong in that case. Whether it was fixed wrong or right by that jury and the circuit court and Supreme Court, is now no difference, as it has passed into final judgment and must give peace. No matter whether Beckwith's deed really covered the land or not. The judgment is his deed. That verdict and judgment operated to vest title in Beckwith as against Neal up to that line just as effectually as if Neal had conveyed or released the land to Beckwith to that line. If Logan had in any wise, by deed or by limitation, acquired title, at the date of his deed to Neal, beyond that line, and passed it to Neal by that deed, that title was lost to Neal by force of that verdict and judgment. It needs no authority for this old

proposition of the law of finality of verdicts carried into judgment. The Code, ch. 90, section 35, gives a judgment in ejectment such effect. Otherwise what is the use of a suit, verdict and judgment? But the instruction in hand says that possessson would give title to Logan and he passed it to Neal, leaving the inference that Neal thus got legal title, and still held it, regardless of the effect of the subsequent verdict and judgment. The instruction forgets that element of the case. Any title existing before in Logan or Neal was gone, and immaterial in the present case. It is useless to discuss whether there was such possession anterior to Logan's deed as to give him title. After that judgment Neal must get a *new* title by possession or otherwise for land on the Beckwith side of the line fixed by the jury. He has no title by conveyance, as none appears. He must then get it by *new* possession, a *new* title by possession after judgment in the former suit. The finality of said trial is another reason why it was error to allow evidence of a survey of the land in the deed from Stokely to Beckwith. The verdict located that deed; the verdict is the deed; its boundaries are the only test without the deed. Where are they? What land does the verdict give Beckwith? These are the questions. The plaintiff's declaration calls for bounding his claim on the Stokely-Neal line. That line is where the verdict laid it down on the ground. I would say not where the deed placed it, if I could say that the verdict differed as to its place from the deed, as I do not say. Such is the force of the verdict and judgment in the old suit.

I do not think this oblivion in this instruction of the judgment is cured by the instruction spoken of under the next assignment of error, which puts recovery by Beckwith from Neal in as an element of its hypothesis. This instruction is so strong in stating that Logan acquired title by possession before he conveyed to Neal, that it was calculated to confuse the jury and inspire belief that such title was still in Neal, and it would not be going very far to say that they conveyed inconsistent impressions. How any jury could avoid confusion amid so many instructions as were involved in the case, we cannot realize. Hence the need of clearness. This instruction, I repeat, is faulty in not incorporating the former judgment in its hypothesis. If that judgment cov-

ered the land in contest, Logan's or Neal's title before its date was utterly immaterial and foreign to the case. If that verdict fixed the line as the Beckwith side claims, it is immaterial whether he had possession before it or not of his tract.

Defendant's counsel says that the uncontradicted testimony shows that the old verdict found for Beckwith the land in controversy, and for this reason the instruction was improper. Just where the line fixed by the verdict is,is a question of fact, on which we cannot properly express an opinion, in view of a new trial. We say however, that if the verdict in the former case gave the land to Beckwith, that is an end to Neal's claim to its date.

The twelfth assignment of error is, an instruction that if good title was conveyed to the land in controversy by Logan's deed to Neal, the jury should find for the plaintiff, unless Beckwith thereafter, in a court of proper jurisdiction, recovered the land from Neal, and if such recovery was shown, the plaintiff could prove title to himself acquired after such recovery by adverse possession "under color claim of title other than that adjudicated in such suit, or otherwise." It is not easy to say what the instruction means. The deed from Logan to Neal was in evidence in this case. It was not in the Beckwith-Thompson action. This instruction would say that the suit did not affect Neal's title under the Logan deed, because not adjudicated. This would leave that deed to have force notwithstanding the former suit. So the jury might say. But that is not correct. That judgment wiped away all title of Neal acquired under his deed from Logan. The instruction says that Neal could acquire title by possession "or otherwise." How otherwise? Under the evidence there is no appearance of claim except under the Logan deed or possession. It seems indefinite and misleading. And plaintiff could not go beyond the Neal-Stokely line, as his declaration only claims to it.

The thirteenth assignment of error is, that the court instructed that if Beckwith by said former suit recovered of Neal land adjoining the land described in the deed from Logan to Neal, 1st February, 1867, and after such recovery Beckwith had the lines between his lands so recovered and the land of Neal, "run and established as now claimed by the

plaintiff, and recognized and treated such line as the line between the said line of Beckwith and Neal, acquiesced therein thereafter, and for ten years prior to the institution of this suit, said Neal had actual adverse possession of the land in controversy claiming to the line so run, and established by said Beckwith, then the jury should find for the plaintiff."

This instruction, after conceding recovery by Beckwith in the former suit, whereby clear title would vest in him, and which would give certainty and remove all doubt as to the line, says that mere agreement, acquiescence by Beckwith and possession by Neal would pass and transfer Beckwith's title fresh from victory. The law says that it takes a deed to pass land. If it is to be done by agreement on a line, there must be doubt and uncertainty as to the true line. Here there was no doubt, no uncertainty. The old suit removed uncertainty and doubt. Doubt and uncertainty constitute the consideration for the agreement to stand on. *Le Compte* v. *Freshwater*, 56 W. Va. 326; 5 Cyc. 932; *Turner* v. *Baker*, 27 Am. R. 226. Therefore such agreement, if proven, would be void. And there must be controversy; and the agreement made as a compromise. These elements are omitted in the instruction. This instruction confuses right by mutual agreement upon a line, and right by adverse possesession, two different things, as the one is friendly growing out of agreement, the other hostile relation unconnected with agreement. Whilst such agreement must be executed at once by actual possession to the line, ten years occupancy is not required—only time enough to show intent. *Turner* v. *Baker*, 27 Am. R. p. 235. Without such agreement Neal could get title by adverse possession, if proven, and of a character to be adverse possession, and of sufficient continuous duration. Perhaps the defendant could not complain of this confusion. This instruction is however intended to say that such an agreement would do away with the effect of said verdict and judgment. It would not, if fully proven, for want of doubt and uncertainty as to the line. The decisions say that the only reason why such agreement can hold as not violating the statute of frauds is, that it does not originate or create a line, but simply ascertains its place amid doubt and uncertainty. But it was fixed free from doubt and

uncertainty, in the eye of the law, by that verdict and judgment. And to make such agreement binding it must be definitely agreed and very clearly proven. The evidence of Stout, the surveyor on whose survey the alleged agreed boundary line rests chiefly, says, without any evidence to contradict his statement, that he did run a line at Beckwith's request, and that Beckwith indicated to Paul Neal, son of Daniel R. Neal, the latter not there, his willingness to agree to the line, and they went to Parkersburg to execute an agreement, but Neal declined to execute the agreement, Paul saying they had changed their minds since they were on the ground the day before, and Beckwith declared that, "they will never get me to agree to that again". Here is no consummated agreement—a mere disposition to compromise. This was not ten years before suit. And Beckwith's executor went on the land in 1904 claiming it, recognizing no such agreement. "A party is not bound by any admission in an offer tending to a compromise, which was not accepted." *Williams* v. *Price*, 5 Munf. 507. On this unconsummated agreement an instruction giving it full force was based. It is said that Beckwith in surveying stopped short of the line claimed by his administrator in this suit. This was because distance gave out; but perhaps he did not know that calls for an ascertainable line or marked corner take precedence over mere distance. Beckwith never admitted that this line was the true Neal-Stokely line. Suppose he had; suppose he had even admitted that he did not own the disputed land. It would not take away his title or estop him from afterwards claiming it. When the statute of frauds requires a deed to pass title, it would be absurd to say that an unaccepted proposal, for compromise, or mere knowledge that one is cutting timber or sod on one's land, or claiming it, and he remains silent, or does not sue, or even concedes by words the right of his adversary, his title is gone. The law denies this. He may have done so for mere peace and freedom from annoyance. 2 Wigmore, Ev. section 1061. It is well settled that the true owner may change his mind, and assert his right. It is no estopple. What pay does the party get for his land? It is not proven that Beckwith ever induced Neal to act on his conduct or change his condition or spend money in faith of it. If Neal chose to act on it—and what loss did he incur by it

or outlay did he make?—it was his own risk. And had he not the same means of knowing where the jury had fixed the line as Beckwith? By no such oral admissions or conduct as shown in this case can a man lose his title, on ground of estopple or otherwise. *Suttle* v. *Railroad*, 76 Va. 284. In *High* v. *Pancake*. 42 W. Va. p. 607, we said "Mere oral declarations to destroy title are inadmissible, because parol disclaimers cannot affect a vested title in the face of the statute of frauds." The authorities there cited, and 3 Cyc. 725, 784, show this. And to make an agreed boundary, if not written, there must not only be a finished agreement, but it must be carried into execution by the parties by full actual possession to the line. *Gwynn* v. *Schwartz*, 32 W. Va. 487. And as the declaration in this case only claims to the Neal-Stokely line, the plaintiff can go no farther, even if there had been a valid agreement to fix a line.

The fourteenth assignment of error is, that the court instructed that if after judgment in said action of *Beckwith* v. *Thompson*, Neal was in actual possession by residence, inclosure, clearing, pasturing, sodding or cultivation of the land in controversy up to a line marked on the new plat, in this action under claim of title other than that adjudicated in said suit, the jury must find for the defendant. We do not say whether the evidence proves possession under Neal. There is great question whether any foot of the land in controversy was in such occupation by residence, inclosure, cultivation or clearing as to give title by limitation. We do not decide in view of a new trial. I make such remark for this reason. The plaintiff gave evidence of occasional acts of cutting sod and timber and pasturing cows. Now, as cutting sod and pasturing cows which wandered from the Beckwith tract across the line for want of a fence were in evidence, the jury might have concluded that such pasturing, cutting sod and timber, in and of themselves, were adverse possession, whereas they are not. *Turpin* v. *Saunders*, 32 Grat. 27. When there is otherwise actual occupation they may go along helping to show actual possession. The defendant claimed that there was no residence on this land, no clearing, no continuous inclosure, and that such inclosure as there was went down, the rails carried away and burnt, and the inclosure lost. In view of this, the instruction should

have mentioned the occasional pasturage of cows, cutting sod and timber only in connection with other acts, residence and inclosure, not as of themselves constituting adverse possession. They are mentioned in the disjunctive; the instruction is that each of those occasional acts makes such possession. This is not the case. They do not shut out the owner. Mere claim of title and occasional act of trespass will not make adverse possession. They want continuity. *Wilson* v. *Braden*, 56 W. Va. 372; *Oney* v. *Clendenin*, 28 *Id.* 34. Instruction should be clear as applied to the evidence and claims in the case, not such as may mislead. *Parkersburg Indus. Co.* v. *Schultz*, 43 W. Va. 470.

The sixteenth assignment of error is, that the court refused to give defendant an instruction that if the verdict and judgment in the former action gave Beckwith the land in controversy they were conclusive against the plaintiff. The court gave it, but with a modification, "unless the jury believe that the plaintiff is entitled to recovery under other and different title and rights under color or claim of title as hereinbefore set forth in instructions for plaintiff." I think the instruction as offered was objectionable in not saying, unless Neal had, by possession since the judgment, got title; but how as to the modification? What are "the other and different title or rights under color or *claim* of title" on which plaintiff could recover? They are those specified in other instructions. Could a jury grope amid a maze of complicated instructions to get specification of such title or right? Is the Logan deed relied on for color? Where does it go? Surveying did not define it, and therefore possession of part under it would not be possession of the whole. As color is stopped at the old line as settled by the verdict, the declaration stops there also. Does it refer to right acquired by limitation? It imports possession, giving right to the whole, whereas the evidence of adverse possession, if any, presents the question of possession of part or all. I think the modification was vague and obscure.

The seventeenth assignment of error is, the refusal of an instruction that if the verdict in the former action fixed the line D–E as the Neal–Stokely line, then that line defined the extent of the boundary specified in the plaintiff's deed, and it did not constitute afterwards color of title to any land be-

yond said line, and that possession thereafter by plaintiff beyond said line would be adverse only to the extent of an actual and exclusive inclosure, and would not give plaintiff adverse possession to any land beyond that line "outside of his actual inclosure." The court changed the word, "inclosure", to "possession", and as thus modified gave the instruction. Here it is proper to repeat, that plaintiff showed no paper title; and further that his deed from Logan as mere color of title for adverse possession could not go over the line fixed by the verdict, because it fixed the Neal and Stokely line, and the deed is limited to it, does not pretend to go over it, and the declaration does not. No color of title, therefore, appears beyond that line, and hence any possession by Neal over it must be confined to actual occupation. Now, what could the substitution of the word "possession" for "inclosure" mean? There was evidence of occasional cutting sod and timber and pasturing cows wandering across the line for want of a fence, and of a poor fence standing a short time on a line, then destroyed by persons carrying off and burning the rails, leaving only a line of posts, as proven by plaintiff's witnesses. Perhaps it would mislead under the circumstances developed by the evidence, would be the argument against the modification. As stated above those things do not, in law, constitute "actual possession" under the statute. There was evidence claimed by the plaintiff to show cultivation of a field of three acres. It was a question whether it was on the land in dispute. That was not defined in bounds by plat or definite evidence, yet the recovery was of all the land. Even if it had been defined, and possession of it had been sufficient to hold it, this would give no right under the statute beyond its limit. But that evidence, on the theory that if there be any evidence tending to show the facts of an instruction justifies it, probably makes the instruction too narrow. It is true that many cases do say that where there is no color of title, but only *claim*, possession does not go beyond inclosure. *Core* v. *Faupel*, 24 W. Va. 238; *Parkersburg Indus. Co.* v. *Schultz*, 43 *Id.* 470; *Va. Midland* v. *Barber*, 97 Va. 118. But others use broader language. *Core* v. *Faupel*, 24 W. Va. 238, point 239. *Oney* v. *Clendenin*, 28 W. Va. 34, uses the words actual possession "by enclosing it under fence, or by clearing it, or in some other visible or notorious man-

ner." See *Swan* v. *Young*, 36 W. Va. 57; *Ewing* v. *Barnes*, 11 Peters 41; 1 Am. & Eng. Ency. L. (2d Ed.) 847; *Ellicott* v. *Pearl*, 10 Peters 412; Tyler on Eject. 892. Fencing is not necessary if there is cultivation or other sufficient act. 1 Am. & Eng. Ency. L. (2d Ed.) 827, 828. I think that if one cultivate a field for the period, with claim, it is enough. The word substituted is "possession", making the instruction read "actual possession." Various things make actual possession, and it may be said this change does not clarify, but is bad because it does not define what makes it. It has a meaning, however. If the instruction had gone on to define it, and defined it wrong, it would be error; but I cannot say that the change merely is error. A party has right to an instruction, if good, in his own words; but I think the word "inclosure" made the instruction too narrow, under the theories presented by the case, and I do not see that the change is bad. But it is proper to say that this instruction cannot be applied to make occasional cutting of sod or timber, pasturing cows, or a fence once built, but suffered to go to decay, or destroyed by persons stealing and burning its rails, leaving nothing but a line of posts, thus breaking the continuity of possession, sufficient to show adverse possession. *Oney* v. *Clendenin*, 28 W. Va. 34, 1 Am. & Eng. Ency. L., (2d Ed.) 827-8; 1 Cyc. 990. I remark that where the word "inclosure" was used in the Parkersburg Industrial case we were discussing the efficiency of the fence as an inclosure. And it is prudent to say, lest this instruction mislead on another trial, that the plaintiff shows no paper title; and further that his deed from Logan, as mere color of title for adverse possession, could not go over the line fixed by the verdict, because that fixed the Neal-Stokely line and Logan's deed is limited to that line, and also the declaration in the present case claims to go no farther. No color of title appearing beyond that line, Neal could go no further than actual occupation by inclosure, cultivation, residence, clearing or other open, notorious manifestation of hostile possession, according to the nature of the case. It could not go to the extent of the controverted land, though Neal *claimed* it all. *Heavner* v. *Morgan*, 41 W. Va. 428. The rule that possession of part is possession of the whole does not apply where there is no *color*, but only *claim* of title. There is no whole in such case, as there is no writing to call for or bound such whole.

The eighteenth assignment of error is, refusal of an instruction of defendant that Beckwith's possession of any part of the land within the boundary defined in the verdict map, would, after the affirmance of the judgment in the former action, give Beckwith possession of the whole up to the limits of said boundary, "except such parts thereof as may have been in the actual adverse possession of the plaintiff by inclosure sufficient to exclude Beckwith therefrom." The court struck out the words "by an inclosure", and inserted before the word "possession" the words "right of." Here the old rule of possession of part is possession of the whole applies. If Beckwith had possession of any part of the land he recovered, he had possession of all, not mere dry right of possession, because that judgment gave him title to what he recovered. Indeed, if he had possession anywhere in his tract, his recovery would give him possession of all the land recovered as part of his tract. Where the use of inserting the words, so as to say he had no possession, but only right of possession?

The nineteenth assignment of error is, the refusal of an instruction. The court struck out "inclosure", substituted possession, so it read "actual possession." As stated above we see no error in this. It is above discussed.

The twentieth assignment of error is, the refusal of an instruction asked by defendant, that to justify the jury in *inferring* an oral agreement establishing an agreed line, in absence of evidence of an actual oral agreement, there must be clear evidence of acquiescence by the parties against whom it is claimed in the actual possession for ten years up to the well defined line, and in the continuous cultivation by the adjoining land owner for ten years up to the line, if the land is capable of cultivation, or if in woods, by the adjoining owner who established such line, with knowledge of the owner against whom it is claimed, always clearing up to the line, and with his knowledge cutting timber and permitting other acts of visible ownership for ten years up to such line, and that the period of ten years must have a definite beginning, and such acts must be continuous and uninterrupted for ten years. This instruction does not refer to a line made by *express* agreement, but to a line claimed to be established by

acquiescence. A man's land is to be lost to him by mere silence, indisposition to sue, neglect. The statute of limitations demands ten years of hostile, open, notorious, continuous, exclusive possession, with claim of title. Why should the rule be otherwise where silence is to take away title? Should mere acquiescence convey title in less time or with less essentials than the statute? It is said that by this instruction the party is put to the burden of proving beginning of possession. Why not? He has to do so under the statute of limitations. The authorities show that this instruction ought to have been given. It was peculiarly proper to present the defendant's theory under evidence relied on by the plaintiff for acquiescence. To make a binding line by acquiescence it must be for statute period. 4 Am. & Eng. Ency L. (2d Ed.) 863. *Gwynn* v. *Schwartz*, 32 W. Va. 487, and 5 Cyc. 942, will sustain this view. See *Adams* v. *Rockwell*, 16 Wend. 285. I fail to discern any line of difference between acquisition by one man of another's land by what is called "practical location", that is, by acquiescence, and acquisition by adverse possession by the statute of limitations. The line of difference is shadowy. There must be in both possession for the statute period with certain beginning. That must be actual. Can it be by signs less signal than the statute requires? Must not this claim of line by acquiescence come up to the measure demanded by the statute of limitations?

The twenty-first assignment of error is, the rejection of evidence of Bailey tending to prove possession of Beckwith of his tract. It is stated that he was "understood" to be a a grandson of Beckwith. It was not shown that his mother was dead. He might never be interested in his grandfather's estate. He was only heir apparent. *Nemo est haeres viventis.* And his evidence did not prove a *personal* transaction between him and his grandfather, even if that would exclude. But he was not giving evidence against Neal's administrator of a personal transaction with Neal. Why not competent?

Judgment reversed.

Reversed.

CHARLESTON

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60 606

LILLY v. CLAYPOOL.

Submitted January 17, 1906. Decided February, 20, 1906.

1. INFANTS—*Lands—Sale of Timber—Decree—Pleading.*

In a summary proceeding under chapter 83 of the Code for the sale of the timber on the land of an infant and sale thereof made upon a written proposition for purchase and under direction and decree of the court and duly confirmed; decrees, entered therein granting abatement to the assignee of the purchaser of a part of the purchase money and extending the time beyond that fixed in the contract of sale for the removal of the timber from the land, which decrees are based upon no pleadings in writing, but alone upon the mere oral representations and motion of the assignee of the purchaser of the timber, are void. (p. 133.)

2. JUDGMENT—*Decree—Pleading.*

A decree not supported by any pleading in writing, is void. (p. 133.)

Appeal from Circuit Court, Logan County.

Bill by W. R. Lilly, guardian, against John W. Claypool and others. From the decree, the guardian and infant appeal.

Reversed.

ATKINSON & JACKSON and LILLY & SHREWSBERRY, for appellants.

RAGLAND & GREEN, for appellees.

McWHORTER, PRESIDENT:

W. R. Lilly, guardian of John W. Claypool, an infant, instituted in the circuit court of Logan county summary proceedings under chapter 83 of the Code, to sell the timber on two tracts of land, the property of said infant, containing 229 and 310 acres respectively in said county devised to him by the will of his father, Robert Claypool; said guardian representing in his petition that a creditor's suit was pending to enforce the collection of debts due the creditors of said testator and that the said creditors were willing that the timber should be sold to satisfy their debts and thus relieve the said land so devised to the infant, and for the payment of taxes in arrears against the property and to pay the taxes for the subsequent years. Notice was given the infant, who was

over fourteen years of age, of such proceeding and a guardian *ad litem* was appointed to defend his interests and assert his rights therein, and the infant and his said guardian *ad litem* filed their joint and separate answer to the petition; and it being shown to the satisfaction of the court, by evidence adduced and taken in open court in the presence of the said guardian *ad litem*, that a sale of all the merchantable timber on the said two tracts of land mentioned and described in the petition would promote the interest of the said infant, John W. Claypool, and that the rights and interests of no person would be prejudiced by a sale of said timber, the court decreed that the same be sold either at public or private sale whichever in the opinion of the guardian would be to the best interest of said infant, the decree fixing the terms of sale, which decree was entered November 6th, 1903.

John Claypool made a proposition in writing to purchase the timber at prices named therein for the various kinds of timber on the terms mentioned in the decree, the bidder to have two years to remove from said tracts of land said timber, and to give bond with approved security for the deferred payments of purchase money. This proposition was reported to the court by W. R. Lilly, the guardian, together with a bond of the purchaser in the penalty of $3,000 with Millard McDonald and J. M. Vance surities therein payable to said guardian and conditioned for the payment of all the purchase money for said timber according to the terms of sale. And on the 7th of November, 1903, the court upon a further hearing of the matter and taking evidence as to the adequacy of the price paid, &c., confirmed the sale as being one that would promote the interests of the said infant and approved the security offered by the purchaser, and the court appointed Dick Perry and J. M. Vance commissioners to count said timber and report to the guardian and to the court the amount, kinds and sizes of the timber on said two tracts. Said commissioners filed their report showing that the timber of said two tracts of land at the prices named made a total of $2,606.25, which report not being excepted to was confirmed. Afterwards, on the 4th day of May, 1905, Millard McDonald appeared in court and presented a deed from John Claypool to himself assigning to him the contract for the purchase of said timber and by oral representation showed to the court

that by reason of the purchaser, John Claypool, having been proceeded against in the Federal court in bankruptcy he had been prevented from marketing the timber within the time prescribed in the contract and that the said McDonald was now the owner of the interest of said purchaser, John Claypool, as shown by said deed filed by him, and asked for an extension of one year for the removal of said timber "and the court deeming the request reasonable" extended the time for one year. In the same manner said McDonald "further brought to the attention of the court that a large quantity of said timber so sold to said Claypool and marked for cutting is on lands other than that owned by said John W. Claypool and the said guardian had no authority to sell the same and prayed the court to have a survey made of the disputed lines between John W. Claypool and the other claimants and ascertain the amount of timber so sold which did not belong to said John W. Claypool and to ascertain the size of the same that a proper adjudication might be had of the matter and the court being of the opinion that the true amount of said timber should be ascertained and that a proper survey should be made of said line in order to ascertain the same doth hereby order E. A. McDonald, County Surveyor of Logan county, to make said survey and to ascertain what timber and the size thereof has been cut and marked for cutting outside the lines of the said John W. Claypool, to all of which W. R. Lilly, guardian for John W. Claypool, objects, which objection is overruled by the court."

Afterwards W. H. File was substituted for the said E. A. McDonald to make said survey. File filed his report, to which the guardian W. R. Lilly and the guardian *ad litem* excepted. First: Because none of the timber reported in said report as being out of the boundary of the land upon which the timber was sold was in fact off of said land and all of the timber sold by the decree was upon the land owned by the infant defendant, John W. Claypool; Second: Because there were no facts before the court at the time the order of survey was directed which warranted the directing of the survey. "No evidence being introduced and only the statements of counsel as to the supposed fact that some of the timber was not on the land; and Third: That if any, or all, of the timber should be found to be off the land of the infant

defendant, the said purchaser, John Claypool, and Millard McDonard, his assignee, were, by their purchase in the proceedings, the count of the timber by the commissioners and the confirmation of their report by the court, estopped from claiming in this cause any credits against the purchase money by reason of any timber being off said land, that the purchaser had the land surveyed before said timber was counted and had cut and removed a large portion thereof and were present in court when the report of the commissioners counting the timber was confirmed and did not then make any objections or exceptions to the confirmation of said report and purchased at their peril.

By decree entered on the 11th of December the court overruled the exceptions of the guardian and guardian *ad litem* to the report of File and decreed a rebate or credit on the purchese money "of $624.00 being the purchase price for the timber both cut and branded outside of the lines of said land as run by W. H. File, which the court finds to be the correct line of said survey." From these decrees the guardian W. R. Lilly and the infant John W. Claypool appealed.

This proceeding was for the purpose of selling the said timber, the property of the infant, John W. Claypool; and the decrees, extending the time for getting the timber off, which is in effect making a new contract or changing the terms of the contract between the parties, and granting the rebate of the purchase money are based upon no pleadings whatever, but upon the mere oral suggestion or representation of said McDonald, who was in nowise a party to the proceedings and though interested as the assignee of the purchaser filed no petition setting forth any grounds for relief in the premises. There is no principle better settled than that a judgment or decree cannot be entered in the absence of pleadings upon which to found the same. *McNutt* v. *Trogden*, 29 W. Va. 469; *Pickens* v. *Love*, 44 *Id.* 725: *Bland* v. *Stewart*, 35 *Id.* 518; *Renick* v. *Ludington*, 20 *Id.* 511, 536; *Chapman* v. *Railroad Co.*, 18 *Id.* 184; *Roberts* v. *Coleman*, 37 *Id.* 143; *McCoy* v. *Allen*, 16 *Id.* 724; *Moseley* v. *Cocke*, 7 Leigh 224. The decrees extending the time for getting the timber off in the contract and making rebate of $624.00 on the purchase money are void and of no effect.

For the reasons stated, the said decrees are reversed and set aside.

Reversed.

CHARLESTON

59 134
66 233

HARVEY v. RYAN et al.

Submitted January 30, 1906. Decided February 27, 1906.

1. INJUNCTION—*Sale of Land—Defective Title—Collection of Purchase Money.*

   Equity will enjoin the collection of purchase money on land where the vendee is in possession under conveyance with covenants of general warranty, where the title to the land is questioned by suit, prosecuted or threatened, or where it is clearly shown to be defective. (p. 143.)

2. SAME.

   Such injunction will not be granted unless the bill alleges facts showing a clear outstanding title in a stranger, and the burden will be on the plaintiff to prove the existence of that title. Allegations of defect of title, which do not show in what respect such defect exists, or facts which establish nothing more than that the title is doubtful or unmarketable, will not support the application for an injunction. (p. 143.)

3. SAME—*Eviction of Vendee.*

   Where a vendee has entered into possession of land, under deed with covenants of general warranty, and in an action of ejectment a stranger asserts title to and recovers the land, and the vendee is evicted, equity will enjoin the collection of the purchase money due the vendor therefor, upon proper bill filed for that purpose. (p. 139.)

4. SAME—*Remedy at Law.*

   At common law, the defense of failure of consideration could not be interposed, nor damages for a breach of warranty of title claimed by way of recoupment, against a sealed instrument. But while, under our statute, these defenses can be made at law, yet where, but for the statute, equity would have jurisdiction, such equitable remedy is not taken away because the remedy at law is given by statute. (p. 141.)

Appeal from Circuit Court, Cabell County.

Bill by H. C. Harvey, executor, against M. B. Ryan and others. Decree for defendants and plaintiff appeals.

Reversed.

WYATT & GRAHAM, for appellant.

SIMMS & ENSLOW, for appellees.

SANDERS, JUDGE:

On the 21st day of June, 1883, M. B. Ryan, by deed with

covenants of general warranty of title, conveyed to Robert T. Harvey a certain lot in the city of Huntington, in consideration of which Harvey executed his bond for $450, payable to Ryan. Ryan's grantor was one Andrew Griffith, who bought the lot of the Central Land Company.

Harvey placed a dwelling upon this lot shortly after his purchase, and on the 23rd day of December, 1885, John B. Laidley, claimant of the lot, instituted, in the circuit court of Cabell county, an action of ejectment for the recovery thereof, against Harvey's tenant, and, by an order of court, Harvey was substituted as defendant in the action.

After the institution of the action of ejectment, Griffith, as assignee of Ryan, brought an action of *assumpsit* in the circuit court of Cabell county on the note executed by Harvey to Ryan, whereupon Harvey filed his bill, setting up the facts of the purchase, the execution of the note, the pendency of the action of ejectment, and further alleging that some time in the year 1882, John B. Laidley instituted an action of ejectment against the Central Land Company to recover possession of a certain tract of land in the city of Huntington, within which tract was included the whole of the lot in question, and that in said action the Supreme Court of this State decided that the acknowledgment of the grantor, in the deed to the Central Land Company, was defective, and that, in all probability, Laidley would be adjudged the lawful owner of the lot in question. The bill, after alleging that Ryan and Griffith were non-residents, and insolvent, prayed that an injunction might be awarded, restraining the prosecution of the action of *assumpsit* until the matter respecting the title to the lot was adjudicated, which injunction was granted.

The action of ejectment brought by Laidley against Harvey was determined in September, 1900, it being ascertained by the final judgment entered therein that the plaintiff had an estate in fee simple in the lot, and that the value thereof, without improvements, was $450, and the value of the improvements made thereon by Harvey was $1000. Laidley elected to relinquish his estate in the lot to Harvey, at the value ascertained.

The parties to this suit having all departed this life,

the same was revived in the name of and against the personal representatives of such respective deceased parties.

On the 23rd day of July, 1904, the executor of R. T. Harvey, deceased, filed an amended and supplemental bill, which, after adopting the allegations of the original bill, and stating the result of the determination of the action of ejectment, alleged that Ryan and Griffith, though often requested, had failed and refused to protect Harvey's title to the lot, and especially the improvements thereon, and that Harvey was compelled to and did pay the judgment, interest and costs, which exceeded any sum which might be due on the purchase money note; that Harvey paid such purchase money, interest and costs through his attorney, Z. T. Vinson, who procured an assignment of the judgment from Laidley to himself; that after the death of Harvey, without the knowledge of his executor, the lot was advertised for sale under the order of sale entered in the action of ejectment, and sold, and purchased by Rufus Switzer, to whom Vinson had transferred the assignment from Laidley; that the Central Land Company, through its attorneys, had promised to save harmless all of its grantees in the property claimed by Laidley, but the Company failing to do so, as to this lot, the executor of Harvey, at the March term, 1904, of the circuit court, procured an order to be entered, showing that the judgment and costs in the action of ejectment had been paid, and the sale was thereupon set aside, and the action dismissed. The amended and supplemental bill averred that Ryan and Griffith were both non-residents, and died, insolvent, in the State of Ohio, and prayed that the injunction awarded R. T. Harvey be made perpetual, that the action of *assumpsit* be ordered dismissed, the bond canceled, and surrendered, and for general relief.

The administrator of Griffith and Ryan appeared and demurred to the original, and amended and supplemental bills, and moved to dissolve the injunction and dismiss the suit, which motions the court sustained, and entered an order to that effect. From this order the executor has appealed.

The single question presented by the bill is, whether or not equity has jurisdiction to grant the relief sought, or

whether the plaintiff should be relegated to his remedy at law. To determine this question, it will be necessary to know when equity will enjoin the collection of purchase money due the vendor, when the contract has been fully executed by a conveyance to the vendee, with covenants of general warranty of title. When we have determined this question, the facts will be found to be of easy application. The authorities in the different states are clearly at variance as to when a court of equity will intervene and grant such relief. "It is exceedingly difficult, if not impossible, by any process of generalization, to deduce from the decided cases principles of general application which shall serve as rules for the guidance of courts and practitioners." High on Injunctions, section 382. While such conflict exists, yet it is the well established, if not the universal rule, that a court of equity will grant such relief in cases of fraud or mutual mistake, or where the covenantor is insolvent, or a non-resident, or where to permit the collection of the purchase money will result in irreparable injury to the vendee.

In this State, and in Virginia, injunctions have been granted against proceedings to collect purchase money, when there is a complete failure of title, though the vendee is in the undisturbed possession of the property, and the vendor is neither insolvent nor a non-resident, and though no suit by the real owner against the vendee has been prosecuted or threatened. Maupin on Marketable Land Titles, 795, says: "The doctrine that the covenantee may retain the purchase money without suit prosecuted or threatened by the real owner, and with a solvent covenantor to make good the damages when a substantial breach of the covenants has occurred, has received little, if any, recognition without the States of Virginia and West Virginia, where it prevails. It is there rested upon the ground that the covenantee has no adequate remedy at law, there being no right of action on the covenant affirmatively or negatively by way of recoupment or equitable set-off, until eviction. Hence it appears that in those states there may be a condition of the title which would justify an injunction against the collection of the purchase money, and yet would not support the defense of recoupment or set-off at law." The doctrine is now well

settled, both in this State and in Virginia, by a long line of well considered decisions, beginning early in the jurisprudence of the State of Virginia, and followed in this State, that the collection of the purchase money will be enjoined, when the vendee is in possession under deed with covenants of general warranty of title, and when the title is questioned by suit prosecuted or threatened, or where the title is clearly shown to be defective, but this doctrine has been extended farther in these states than in any other jurisdiction. It is said by Judge Green, in *Ralston* v. *Miller*, 3 Rand. 39: "This Court has, in favor of a purchaser, gone far beyond anything which has been sanctioned by the courts of chancery in England or elsewhere, in enjoining the payment of the purchase money after the purchaser has taken possession under a conveyance, especially with general warranty. Yet, it has never gone so far as to interfere unless the title was questioned by a suit either prosecuted or threatened, or unless the purchaser could show, clearly that the title was defective." And this was quoted with approval by JUDGE GREEN, of this State, in *Wamsley* v. *Stalnaker*, 24 W. Va. 223, and continuing, he said: "This is the view, which, according to my understanding of the case, has been followed in Virginia and West Virginia, when the vendee was protected by a warranty of title and had not been evicted."

The case of *Wamsley* v. *Stalnaker*, is a leading case, giving a review of several of the Virginia decisions upon this subject, which proceed upon the theory that the purchaser should not be required to pay the purchase money where he is in great danger of losing the property. He is not required to take the hazard of the future insolvency of his vendor. No right of action would exist in favor of the vendee until a breach of the covenant, and it being a covenant of general warranty of title, the breach would not occur until actual or constructive eviction. In discussing the question, JUDGE GREEN says that Judge Tucker, in *Koger* v. *Kane*, 5 Leigh 608, questions the right to the remedy where there is a covenant of good title, because such a covenant would be broken the instant it is entered into, if the title should be defective. And JUDGE GREEN also says: "Judge Tucker bases this right of a court of equity to enjoin the purchase money, though there is a general warranty deed held by the pur-

chaser, if the title is clearly shown to be defective, partly on the ground that on the general warranty the vendee could not sue at law till he was evicted, and seemed to regard it as doubtful whether such relief in equity would be given; if in the deed there were other covenants, which could be sued upon at law before eviction, as, for instance, a covenant for good title; but this point was not decided nor do I know of its decision in any case in Virginia or in West Virginia. It would seem therefore, that the extension of the right of a court of equity to enjoin the collection of the purchase money by the vendor because of defect of title, however clear, might perhaps be confined to the case, when there was no other covenant but the covenant of warranty, and might not be recognized, when there were also covenants, on which the vendee could sue at any time at law, such as covenants of good title."

But in reviewing what Judge Tucker said, in *Koger* v. *Kane*, *supra*, we find that he used this language: "The jurisdiction thus confessedly exercised by the courts of equity with us, results from what may be called the preventive justice of those tribunals. It arrests the compulsory payment of the purchase money, when the purchaser can shew that there is either a certainty, or a strong probability, that he must lose that for which he is paying his money. It gives him the relief, too, though his demand may be in the nature of unliquidated damages, because he has no other means of ascertaining them. Thus, if the purchaser can shew, that he has received, a deed with general warranty, and that the title is bad, yet if he has not been evicted, he cannot maintain covenant at law, and ascertain his damages before that tribunal, in order then to set them off against the demand. If, indeed, there are covenants of good title, &c., it may be otherwise; and so it may often happen, that an action may be brought where there are such covenants of good title, &c., upon which the validity of the title may be tested, and the damages of the party ascertained. Whether in these cases, relief could be given in equity, it is not necessary here to say."

It will be observed that Judge Tucker says it is not necessary to decide this question; and, from his language, it would seem to be susceptible of the construction given by JUDGE GREEN, if this were all Judge Tucker said on the sub-

ject, but, continuing, he said: "But where there is only a covenant of warranty, this cannot be done; and hence, I conceive, the party would be entitled to the assistance of a court of equity, where he is full-handed with proof that his title is defective, although he has not yet been evicted."

This would seem to indicate that he thought, after eviction there would be stronger grounds for equity jurisdiction. And then, in *Beale* v. *Seiveley*, 8 Leigh 675, Judge Tucker says: "With us it cannot be denied that the practice has been more lax. But even with us, relief is only given to a purchaser who had obtained his deed, where there had been an actual eviction, or where a suit is depending or threatened, or where the vendee, placing himself in the attitude of the superior claimant, can shew a clear outstanding title or incumbrance."

But even if that decision, in dealing with this question, did place it partly upon the ground that there is no breach of the covenant of general warranty until eviction, and, therefore, no right of action accrues to the vendee, still there is an additional reason why this remedy should be extended, that is, the remedy of the vendee, at law, is not adequate and complete. If the purchaser should be required to pay the purchase money, and the suit, prosecuted or threatened, should result in a total loss to him of the property, it would then be necessary for him to bring an action for breach of the covenant, while, in the meantime, the covenantor might have become insolvent. And this would also be true as to a vendee who had been evicted by reason of a superior title before the purchase money had been collected, because, while a right of action for damages would exist to the vendee, upon the covenant, yet the defense would not be available to him in an action brought against him upon a writing obligatory, given for the purchase money. The writing being under seal, it imports consideration, and a defense of failure of consideration or want of consideration cannot be interposed to a writing under seal, at common law. Neither could the damages resulting from a breach of the covenant of warranty be relied on as a common law counterclaim in the nature of recoupment, since the writing sued on is under seal. The supreme court of Virginia, in *Columbia Accident Ass'n* v. *Rockey*, 93 Va. 684, says: "But while a defendant, under

the plea of *non-assumpsit*, might give evidence of matter by way of recoupment, or in dimunition of the damages claimed by the plaintiff, even to the entire defeat of his action, yet it was not competent for the defendant to recover in that suit any damages he may have shown in *excess* of the damages of the plaintiff. If he wished to recover such *excess*, he could only do so in an independent action against the plaintiff. 4 Minor's Inst., Pt. 1, 793 and 798. Nor was it competent at common law, as against seal contracts, to prove a failure in the consideration of the contract, or fraud in its procurement, or breach of warranty of title or soundness of personal property, but the defendant was driven, as when he proposed to recover against the plaintiff any *excess* of damages, to his independent action at law to recover the damages he had sustained: 4 Minor's Inst., Pt. 1, 792; *Taylor* v. *King*, 6 Munf. 358; *Burtner* v. *Keran*, 24 Grat. 42; and *Hayes and Wife* v. *Va. M. P. Ass'n.*, 76 Va. 225. The object of the act of 1831 was to remedy these defects, and to enable a defendant both to make such defenses to a suit at law on specialties, and also to recover against the plaintiff any excess of damages he may have sustained, in order to settle in one suit all the rights of the parties arising under the contract, and to prevent circuity of action and a multiplicity of suits, Its object was to enlarge the right of the defence, and not to impair any previous right, or to take away such defences where the law previously permitted them to be made."

And in *Kinzie* v. *Riely's Ex'rs*, 100 Va. 109, it is held that damages for breach of warranty could not be claimed at common law by way of recoupment, against a sealed instrument. *Sterling Organ Co.* v. *House*, 25 W. Va. 83; *Williamson* v. *Cline*, 40 W. Va. 194; *Watkins* v. *Hopkins' Ex'or*, 13 Grat. 743. It will therefore be seen that although there is a breach of the covenant of warranty in the deed from Ryan to Harvey, yet he cannot set this up as a defense in the action brought against him upon the purchase money bond, but must rely upon his separate action for damages for a breach of the covenant, and not being able to make this defense to the action of *assumpsit*, a court of equity will not require him to pay the money to the vendor, and compel him to resort to his action upon the covenant, and take the hazard of his vendor's insolvency. We fail to see the reason for such

course. The title to the land has been adjudicated to be in Laidley, and Harvey has been ousted. The property for which the purchase money bond was given has been totally lost to him, and there is no reason why a court of equity should not enjoin its collection. His legal remedy is wholly inadequate. He may pay the money and then sue at law upon the covenant to recover it back, but this could not be a complete and adequate remedy. The vendor, in the meantime, may have become totally insolvent. This risk the vendee will not be compelled to accept, but equity will extend its aid and prevent the collection of the purchase money.

What we have said as to the defenses to a sealed instrument, applies to the common law doctrine, for, under our statute, section 5, chapter 126, Code, a defendant may plead failure of consideration, fraud in the procurement of the contract, or breach of warranty of title, but this is only concurrent with the equitable remedy, and by section 6 of the same chapter, it is provided that such defense need not be interposed at law, and if not so interposed, it can be availed of in equity. By this statute it was not intended that the equitable remedy be taken away, but, on the other hand, it is expressly reserved. It was only intended to permit such defense to be made at law, at the election of the defendant. Therefore, if equity, before the enactment of this statute, had jurisdiction, it still has jurisdiction, notwithstanding a remedy by defense at law is given by statute. *Knott* v. *Seamands*, 25 W. Va. 99; *Bias* v. *Vickers*, 27 W. Va. 456; *Jarrett* v. *Goodnow*, 39 W. Va. 602; *Kenzie* v. *Reily*, *supra*.

While some cases have been referred to, to support the views herein expressed, yet, to demonstrate more conclusively that the rule is firmly fixed, and has been followed in this State since the question was first presented, it may be well to review other cases on this subject. In *Womelsdorf* v. *O'Conner*, 53 W. Va. 314, it was held that where land was conveyed by deed with general warranty, and the vendee lost the land, that equity will enjoin the collection of the purchase money. JUDGE BRANNON, in delivering the opinion of the Court in this case, on page 316, says: "Counsel for O'Conner would impress upon us the law of actions upon a covenant of warranty; would treat this as if it were a suit by Womelsdorf to recover back money paid upon the land under a breach o

warranty. It is not such a suit. It is a suit to enable Womelsdorf to keep in his hands purchase money for his indemnity; I should rather say, not for his indemnity, should he lose the land, but to be relieved from paying money for land already irrevocably lost to him." And in *Bennett* v. *Pierce*, 50 W. Va. 604, the same doctrine is announced, citing with approval *Wamsley* v. *Stalnaker*, *supra*. And in the case of *Kinsport* v. *Rawson*, 29 W. Va. 487, we have: "Equity will enjoin the collection of purchase money on land on the ground of defect of title after the vendee has taken possession under conveyance from the vendor with general warranty, if the title is questioned by a suit, either prosecuted or threatened, or if the purchaser can show clearly, that the title is defective." It is said in this case to show that the title is questioned by a suit, either prosecuted or threatened, that the bill, on its face, must allege the ground on which the threatened suit is based, which must be such as will put a reasonable man in just apprehension of a loss of his land; that the mere fact that some one has asserted claim to the land is insufficient to justify a court of equity in restraining the collection of the purchase money. And in *Heavner* v. *Morgan*, 30 W.Va. 335, it was held that equity will not require a vendee, who has purchased land and taken a deed with covenants of general warranty, to pay the purchase money, when a part of the land sold is claimed by others, and the title is defective, but that if the purchaser can show clearly that the title is defective, equity will not require him to pay the purchase money until such defect is removed, or a proper abatement decreed, and citing with approval: *Yancey* v. *Lewis*, 4 H. & M. 390; *Rolston* v. *Miller*, 3 Rand. 44; *Koger* v. *Kane*, 5 Leigh 696; *Clarke* v. *Hardgrove*, 7 Grat. 399; *Lovell* v. *Chilton*, 2 W. Va. 410; *Wamsley* v. *Stalnaker*, *supra;* and *Kinports* v. *Rawson*, *supra*. Also, see the following authorities: *Renick* v. *Renick*, 5 W. Va. 285; *Thompson* v. *Catlett*, 24 W. Va. 524; *McClaugherty* v. *Croft*, 43 W. Va. 270; *Morgan* v. *Glendy*, 92 Va. 86; *Gay* v. *Hancock*, 1 Rand. 72; *Beale* v. *Seireley* 8 Leigh 658; *Grantland* v. *Wight*, 5 Munf. 295; *Richards* v. *Mercer*, 1 Leigh 125.

It is argued by counsel that there is no averment of irreparable injury, that while it is averred that Ryan, the immediate grantor of Harvey, is insolvent, yet it is not averred

that the Central Land Company, Harvey's remote grantor, is insolvent. The allegation of insolvency has never been one of the requisites for extending relief of this character, and even if it were so, it is averred in the bill that Ryan, the immediate grantor is a non-resident, having died, in the State of Ohio, insolvent, and the vendee would not be required to pay the purchase money and then resort to his action against a remote vendor. While it is true the Central Land Company conveyed with covenants of general warranty of title, which covenant runs with the land, and of which the vendee could avail himself, yet equity will not permit the collection of the purchase money from him, and compel him to resort to this remedy; and not only that, but the remote grantor would only be liable upon his covenant for the amount of the purchase money paid him, which might, in many instances, be wholly inadequate, even if such remedy should be resorted to. While it is true, in this case the consideration paid to the Central Land Company is the same as that paid by Harvey, yet this cannot alter the case, because the rule must be one of general application, and not one which may be applicable to some cases, and not to others.

We deduce from the authorities that it is clear, from the allegations of the bill, that equity has jurisdiction to enjoin the collection of the purchase money. The original bill shows that the action of ejectment was instituted for the recovery of the land conveyed to Harvey for which the bond was executed. The amended and supplemental bill shows that the suit was prosecuted to a final termination, which resulted in a judgment in favor of Laidley. Harvey, having made improvements upon the property, the question of the value of the improvements, and the value of the lot, without improvements, was submitted to the jury, and the lot, having been found to be of the value of $450, and the value of the improvements, $1,000, Laidley elected to relinquish his title to the lot, and accept its value, and the lot was ordered sold unless the amount at which it was valued was paid by Harvey. Subsequently the lot was sold, but the sale was not confirmed, and Harvey satisfied the judgment. This being so, a court of equity will not require the payment of the purchase money by Harvey, and force him to his action upon

the covenant contained in his deed from Ryan, even if he were solvent, but the fact of his insolvency is an additional reason for equitable interference.

It is claimed that at the time Harvey purchased the lot, the ejectment suit was pending, and that this is an additional reason why a court of equity should not entertain him. The deed to Harvey is with covenants of general warranty of title, and although the action of ejectment was pending, yet this will not prevent him from enjoining the collection of the purchase money.

Care should be taken, however, to distinguish the case here from that class of cases in which injunctions to prevent a sale under a deed of trust, whether executed to secure deferred payments of purchase money, or to secure general indebtedness, have been freely granted in this State and in Virgina, upon the allegation that there is a cloud upon the title to the land about to be sold. In such cases, the injunction is granted until the cloud on the title is removed. This is done in the interest of all parties, that there may be no sacrifice of the property, and that the title of the purchaser may be assured.

For the reasons given, we reverse the decree of the circuit court, dissolving the injunction and dismissing the bill, and remand the cause.

Reversed.

CHARLESTON

ROBINSON *v.* GOLDMAN'S ADM'R *et al.*

Submitted January 23, 1906. Decided February 27, 1906.

1. APPEAL.—*Procedure.—Review.*

   This Court exercises its appellate jurisdiction by appellate process only, and where no such process has been allowed, this Court is without power to review for error. (p. 148.)

2. APPEAL.—*Dismissal.*

   A case in which the appeal allowed must be dismissed as improvidently awarded because not allowed from any order or decree in the cause. (p. 148.)

Appeal from Circuit Court, Wetzel County.

Bill by Samuel I. Robinson against B. B. Postlethwaite and and others. Decree for defendants, and plaintiff appeals.

Dismissed.

T. P. JACOBS and B. T. BOWERS, for appellant.

HALL & HALL, for appellees.

COX, JUDGE:

This suit in chancery was brought in the circuit court of Wetzel county on the 29th day of May, 1903, by Samuel I. Robinson against B. B. Postlethwait, administrator of the estate of Benjamin Goldman, deceased, Frances Goldman in her own right and as widow of Benjamin Goldman, and his children and heirs.

The petition of Samuel I. Robinson for the appeal recites this fact, and further states: "Such proceedings were thereafter had in said cause, as the record of said cause shows, that on the 10th day of March, 1903, the said cause came on for a final hearing. The record of the said cause and of the final decree therein, of which your petitioner complains, is herewith exhibited.

"Your petitioner is advised and believes and so represents unto your honors that the judgment and ruling of the said circuit court made and shown by said final decree is erroneous, and that he is aggrieved thereby, and he here makes the following assignment as the error complained of.

"After the recovery of $2,792.39, as recited in said decree, the said circuit court further says: '*But the court doth refuse to hold that the same is a charge or lien against the undivided half interest of the defendant, Frances Goldman, in and to the real estate involved in this cause, being lots 94 and 95 of the town of New Martinsville, West Virginia, and doth refuse to enter any decree as to that matter.*' This, your petitioner claims, should have been done.

"For this error your petitioner humbly prays that an appeal be granted and allowed him from said decree of March 10th, 1903, and that the same be reversed and such decree entered, as is right and proper." The appeal was allowed as prayed for.

It will be observed that the date of the decree from which

an appeal was asked and allowed precedes the date of the bringing of the suit more than two months. By examining this record we find that the final and only decree entered in this cause was a decree quashing the attachment and sustaining the demurrer to, and dismissing, the plaintiff's bill, entered on the 8th day of October, 1903, from which no appeal has been asked or allowed. We might consider that the statement, contained in the petition, of the date of the decree from which the appellant intended to ask an appeal, was a clerical error or mistake, if it were not for the further statement therein of the substance of the decree complained of, and the error therein assigned, both wholly foreign to any matter contained in or adjudicated by the decree of the 8th day of October, 1903, in this suit.

It appears by the plaintiff's bill in this suit that there had been a former suit instituted by the appellant against Benjamin Goldman in his lifetime, Frances Goldman, his wife, and Max Goldsmith, and that such proceedings were had therein that a decree was entered on March 10th, 1903, a copy of which is made an exhibit with the bill in this suit. This decree in the former suit, according to the purport of such copy, gave a recovery in favor of appellant against the administrator of Benjamin Goldman for $2,792.39, Goldman having previously died. This decree also contained the language in italics quoted above from the petition, and which, by the petition, is claimed to constitute error. Therefore we have to abandon the idea of clerical error or mistake in stating the date of the decree intended to be appealed from by the appellant. It is claimed that the bill in this suit is a bill of review, filed for the purpose of reviewing the decree in the former suit; but if so, no appeal from any order or decree in this suit has been asked or allowed.

We have then this state of facts: A petition filed in this suit, accompanied by the record of this suit, which petition did not ask an appeal, and no appeal has been allowed, from any decree or order in this suit; but the petition prayed for an appeal from a decree in another suit, and assigned an error therein, and from that decree an appeal was apparently allowed without a transcript of the record of that suit. We have no record upon which to review the decree in the former suit. We have a record in this suit, but

no appeal upon which to review it. How this confusion arose we are unable to say.

This Court exercises its appellate jurisdiction by appellate process only, and where no such process has been allowed, this Court is without appellate power to review for error. The statute in substance, provides that with a petition for an appeal, writ of error or *supersedeas*, there shall be a transcript of the record of so much of the case wherein the judgment, decree or order is, as will enable the court or judge to whom the petition is to be presented, properly to decide on such petition, and as will enable the court, if the petition be granted, properly to decide the questions that may arise before it. Coce, chapter 135, section 5.

A case will be dismissed by the appellate court when it does not appear from the record that an appeal was taken. 2 Cyc. 1025; *Plumber* v. *People's Bank*, 73 Iowa 752; *Beard* v. *Arbuckle*, 13 W. Va. 732.

Under the facts here appearing we have nothing further to consider. The appeal granted must be dismissed as improvidently awarded.

Dismissed.

CHARLESTON

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f65 433

CAMDEN v. THE WEST BRANCH LUMBER CO.

Submitted February 13, 1906. Decided February 27, 1906.

1. ADVERSE POSSESSION—*Junior Patent—Interlock—Actual Possession.* The actual possession of the owner of a tract of land, lying adjacent to another tract of uncleared land, the title to which is vested in another person by a grant from the State, is not extended over a portion of such other tract by the acquisition of a junior patent, covering such portion and purporting to vest title thereto in the owner of such first mentioned tract, however long such possession may continue. To work an ouster of the elder patentee and hold adversely to him, the junior patentee must take actual possession of some part of the land included in the junior patent and within the boundaries of the senior patent. (p. 160.)

2. UNLAWFUL DETAINER—*Lease—Color of Title—Possession.*
For evidential purposes in an action of unlawful entry and detainer between the owner, or a claimant under color of title, of a large tract of land and another person, possession of a small portion of such tract by a tenant of such owner or claimant, under a lease restricting the right of occupancy and use of the land by the tenant to such small portion, is, in legal effect, possession by the owner or claimant of so much of the entire tract as is not in the actual, hostile possession of some other person. (p. 163.)

3. UNLAWFUL DETAINER—*Evidence.*
In an action of unlawful entry and detainer, it is not reversible error to refuse to allow the introduction, by the defendant, of a deed or contract showing he does not own, and is not in possession of, a portion of the land sued for. (p. 164.)

Error to Circuit Court, Braxton County.

Action by J. N. Camden against the West Branch Lumber Co., a corporation. From a judgment in favor of plaintiff, said Lumber Co. brings error.

Reversed.

MALLOHAN, MCCLINTOCK & MATHEWS, for plaintiff in error.

W. E. HAYMOND and A. W. CORLEY, for defendants in error.

POFFENBARGER, JUDGE:

The West Branch Lumber Company, a corporation, complains of a judgment rendered against it in an action of unlawful entry and detainer, instituted by J. N. Camden, in the circuit court of Braxton county, by which judgment, possession of a tract of land containing two hundred acres, claimed by said corporation, was given to said Camden. The errors assigned relate to instructions given and evidence excluded.

The plaintiff below, defendant in error, derived his title from Andrew Perrine, who obtained a grant for said two hundred acres of land from the Commonwealth of Virginia on the second day of April, 1855. Perrine then owned a tract of seventy-five acres granted to Mifflin Hines in 1819, and conveyed to his ancestor, Lewis Perrine, by deed dated September 1, 1837, a boundary line of which touched, at one point, said tract of two hundred acres. Camden introduced the patent for the two hundred acres issued to Andrew Perrine; a deed executed by A. S. Knight, Virginia Knight,

W. R. Perrine and others, heirs of Andrew Perrine, dated January 17, 1887, conveying to J. S. Hyer and A. C. Dyer said tract of two hundred acres; a deed from J. S. Hyer and wife and A. C. Dyer and wife, dated July 18, 1890, conveying said two hundred acres to J. N. Camden; a deed from Lewis Perrine and wife, dated September 1, 1837, conveying said seventy-five acre tract to Andrew Perrine; a deed from George McElwain and Andrew Perrine, dated January 10, 1843, conveying to Andrew Perrine sixty-one acres of land, a part of a tract, containing one hundred and sixteen acres.

The defendant below derived its claim of title as follows: A grant of a tract of five thousand acres made by the Commonwealth of Virginia, on the 13th day of April, 1786, to Samuel Young; sale and conveyance of said tract, as delinquent and forfeited land, under proceedings had in the circuit court of Braxton county in 1841, by the Commissioner of Delinquent and Forfeited Lands, to Gideon D. Camden, by deed bearing date April 13, 1842; a deed from said Camden to Francis Albright, dated April 15, 1842, a deed from Norman D. Squires, recorder of Braxton county, William L. J. Corley and Morgan H. Morrison to Henry Brockerhoff and others, dated September 9, 1870; a deed from William L. J. Corley. clerk of the county court of Braxton county, to A. N. Ervin, dated January 3, 1879; a deed from A. N. Ervin and wife to Margaret C. Brockerhoff, dated September 6, 1879; a deed from Andrew Brockerhoff and others to the West Branch Lumber Company, dated December 20, 1889. All of the above mentioned deeds refer to the land by them conveyed as the land patented by Samuel Young and evidence was introduced on the trial tending to prove that the two hundred acre tract of land in controversy lies within the five thousand acre tract granted to Samuel Young in 1786, and was not excepted therefrom.

Plaintiff below proved that Andrew Perrine had resided for many years on said seventy-five acre tract of land at the time he obtained the patent for said two hundred acre tract: but did not then take and hold actual possession of the latter tract. He never at any time resided on it, but kept the taxes on it paid and cleared a small space on one corner of it. A clearing made on the seventy-five acre tract extended slightly over

on to said two hundred acre tract. When this was done, does not appear, but it must have been prior to 1890, as it was done by Andrew Perrine, who died before that time. Nothing in the evidence indicates whether this occupancy continued for any length of time. Soon after Camden purchased the land he sold the timber on a part of it to B. H. Camden and H. P. Camden, who, about 1892 or 1893, took off of it the timber purchased by them, and, while these timbering operations were in progress, some houses were built on the land for use in connection with them. Near that date, the West Virginia and Pittsburg Railroad was built through said tract, and a number of persons, employed in the construction of the road, settled at various points on the land along its line. After the completion of the timber operations and the construction of the railroad, some of the people, who had come there as employes, remained upon the land; and whose tenants they were, and who had possession of the houses and small cleared lots after these operations ceased, were controverted matters in the trial. The only evidence tending to show any occupation of the land prior to the cutting of the timber and the building of the railroad is that of Jacob A. Hosey, who says he built a house on it for Hudson Knight, a son-in-law of Andrew Perrine, before the war, but never completed it and it was never occupied. This man built some of the houses for the railroad company or its contractors. Elizabeth Mowery moved in the old house built by Hosey before the war, when B. H. and H. P. Camden were taking the timber from the land, and she says B. H. Camden told her she could stay there as long as she wanted to, and furnished lumber to put a floor in the house. She further says she put out fruit trees which still remain on the place; that she kept the property for four years, and that A. W. Corley, agent for J. N. Camden, told her to come there and stay as long as she wanted to. At another place about a quarter of a mile distant from the house which Mrs. Mowery occupied, a Mrs. Treanno was residing in a house on the land in controversy at the time this action was commenced, claiming to be a tenant of J. N. Camden. She also went on the property while the timber operations were in progress, with the consent of B. H. Camden, as an employe of the Camdens, or one of their contractors. She then oc-

cupied a small house near the one occupied by the Camden laborers and contractors, and, after they left, moved into the house which they vacated. A. W. Corley testified that she was there in July, 1892, with his consent, as tenant of Camden. Her name was then Mrs. Hicks, and some time afterwards Mose Treanno married her, and moved into the house with her. Around this house there was a small piece of cleared land under fence, containing five or six acres. Mrs. Treanno exhibited in connection with her testimony some letters from J. N. Camden to her showing that they recognized each other as landlord and tenant, respectively. The letter of earliest date was written in 1901, but she claims to have had some older that had been destroyed.

A. W. Corley testified that he, as agent of J. N. Camden, gave permission to one Chapman, who had a contract for grading some part of the railroad, to erect shanties and such other houses on the land as might be needed for the accommodation of his employes in that work.

The defendant introduced in evidence a number of leases executed by Brockerhoff and others, claiming the title, held by the defendant company. These are as follows: One executed by M. C. Brockerhoff to Moses Treanno, dated the —— day of June, 1895; one exeuted by said Brockerhoff to Jesse Hosey, bearing date June 1, 1895; one executed by said Brockerhoff to Elben and Clarke Cogar, bearing date December 25, 1897; another executed by the West Branch Lumber Company to J. H. Spencer, dated May 9, 1900; another by the West Branch Lumber Company to John Paulhamus & Son, dated January 1, 1900; another by Paulhamus & Son to F. W. Carpenter, dated February 15, 1901. Jesse Hosey testified that he had moved into a house, belonging to Chapman, the railroad contractor, in 1893; that neither Mrs. Treanno nor Andrew Mowery was living there at that time; and that the only person occupying any part of the two hundred acre tract at that time was Carlisle Cogar, who was running a camp for men employed by McIntire, who was engaged in the Camden timber operations. Hosey continued to reside there, and, on the first day of June, 1895, entered into the written contract of lease with M. C. Brockerhoff, which the defendant put in evidence as above stated. He further stated that, before he moved on to the two hundred acre tract, he

had resided on another part of the five thousand acre Albright survey, which included said two hundred acre tract, under a written contract of lease, entered into with I. B. Cogar, agent for Brockerhoff. Under the lease on the two hundred acre tract, he held an acre and a half of land under fence for a period of three years, and the line of said tract ran through this space. Moses Treanno says his wife was not present when he took the written lease from Brockerhoff and knew nothing about it. Benjamin Carpenter testifies that nobody lived on the two hundred acre tract until the railroad was built. John Dunlap testified that he had been employed by Brockerhoff in August, 1897, to take care of the land in controversy and adjoining lands claimed by him; that he put no tenants on the land, but that there were several living on it; that he let Mr. Detimore have a small piece of it, in 1889, for one year, with the understanding that he would get a lease of it; that there was then no person in possession of the lot on which he put Detimore as a tenant, but that Mr. and Mrs. Mowery had previously occupied it, and that he purchased from Mrs. Mowery, after she had left the land, her claim to the premises which, from what she had said to him about it, he considered a mere "Squatter's claim." Detimore never lived on the land, and, under a verbal agreement with Dunlap, on behalf of Brockerhoff, he fenced up the lot, cultivated it one year and then rented it to E. L. Taylor. He testifies that in 1898, to the best of his recollection, Mrs. Treanno had showed him a letter from J. N. Camden which was in substance as follows: "You said in your letter you are on my land, and if you are, stay where you are." Dr. Brockerhoff, President of the West Branch Lumber Company, and son of M. C. Brockerhoff, hereinbefore mentioned, testified that the two hundred acres in controversy is part of the Albright Survey and wholly within it; that he and those under whom the defendant claims had had possession of said two hundred acres since the purchase thereof in 1879; that no tenants had occupied the land except under leases given by the defendant and those under whom it claimed; that there were only three pieces of the tract capable of occupation and they had had tenants on them; that the two hundred acre tract is entirely surrounded by the other Brockerhoff land, except at one point where an acute angle thereof touches the

Andrew Perrine seventy-five acre tract; that he had had personal charge of the land since 1895, prior to which time Jordan Cogar and Isaac Cogar had successively been in charge of it as agents; that at the time the Camdens took timber from it, 1892, he had no knowledge of the Camden claim, nor of any timber having been cut from the two hundred acre tract; that he had had direct control of the tenants on the two hundred acre tract of land for the last five or six years, and that they were holding under the leases hereinbefore mentioned; that he knew nothing of the Camden claim until 1896 or 1897; that the lands were known as the Brockerhoff lands; that there were always tenants on all parts of them, Jordan Cogar having ordinarily had different tenants on the tracts, at places which he did not specify; that Cogar had reported to him and his co-owners that there were tenants on different parts of the land; that he did not know who the tenants were in 1894; and that he had no personal knowledge of any tenants on the land prior to 1895.

By John Newlon, deputy clerk of the county court of Braxton county, the following facts, concerning the taxation of the Albright survey, were disclosed: "In the year 1865, 4713 acres was assessed to Francis Albright, described as lying on Elk River. For the years '66 and '67 the same land was charged on the books to George Gregory as a tract of 5000 acres. From '68 to '70 assessed to Francis Albright's heirs and Geo. Gregory. From '71 to '77 same tract of land was assessed and charged on the land books as 4715 acres charged to Henry Brockerhoff and others. '78 and '79 charged to Henry Brockerhoff and others. From '80 to '82 it was charged to M. C. Brockerhoff as 4713 acres. From '82 to '85 charged to M. C. Brockerhoff as 4713 acres. From '88 to '97 to M. C. Brockerhoff as 4588 acres. From '97 to 1901 the West Branch Lumber Company, 4655 acres. From 1901 to 1903 the same."

Instruction No. 4, given at the instance of the plaintiff, over the objection of the defendant, is the basis of one of the principal assignments of error. It reads as follows: "The court further instructs the jury that if they believe from the evidence that Andrew Perrine and those claiming under him had possession by actual occupancy of the tract of 75 acres of land; and that the tract of 75 acres of land is adjoining

the tract of 200 acres of land; and that there was no other possession within the limits of the 200 acres of land; and that the said Andrew Perrine and those claiming under him, had actual, continuous, adversary possession of the said 75 acres, claiming the said 200 acres under the grant to Andrew Perrine read in evidence in this cause; then such possession of Andrew Perrine was actual, adversary possession of the tract of 200 acres of land; and if the jury believes that such possession was continued for a period of 15 years prior to the first day of April, 1869, or for a period of ten years after that time then such possession and claims of title to the land under said grant made a perfect title to the said land in the said Andrew Perrine and those claiming under him. And this is true whether the land was subject to grant by the Commonwealth at the time of the patent or not."

In passing upon the exception to this instruction it is necessary to keep in view the nature of the action and the principles involved therein. The action of unlawful entry and detainer differs in very material respects from that of ejectment; but many rules and principles, governing the trial in the latter action, apply in the trial of the former. What they are depends, in some measure, upon the nature of the evidence adduced and relied upon. In some instances, the question of title is never involved. In others it is, and, when it becomes important, in ascertaining the right of possession, the only question actually and finally determined in this class of actions, its influence is potent and far-reaching. A mere trespasser, having not a shadow of right to the possession, may maintain his possession against everybody but the true owner or some other person who shows himself to be entitled to the possession. Such owner or other person need never to have had the actual possession. It suffices for him to show title in himself, because title gives a right of entry, a right to the possession, a right against which a mere trespasser can make no defense. *Duff* v. *Good*, 24 W. Va. 682; *Garrett* v. *Ramsey*, 26 W. Va. 345; *Billingsley* v. *Stutler*, 52 W. Va. 92; *Olinger* v. *Shepherd*, 12 Grat. 262. Thus, though the question of title is not determined in the action, it is an important element in the evidence in determining the right of possession.

It is of immense importance in another class of cases,

namely, where there is actual possession by both parties of parts of a tract or body of land, covered by conflicting title papers such as patents and deeds, as in the case of interlocks. If the owner of the better title has the actual possession of any part of the land in controversy, his possession is held to extend to all the land included within the exterior boundaries of the deed or patent under which he claims, that is not in the actual possession of the other party. *Olinger* v. *Shepherd*, 12 Grat. 462; *Garrett* v. *Ramsey*, 26 W. Va, 345. "The title draws to it the possession of the land not in the adverse possession of another. Actual possession of a part of a tract of land under a *bona fide* claim and color of title to the whole tract, is possession of the whole, or so much thereof as is not in the actual adverse possession of others. This is the general rule in actions of trespass and ejectment. And it has been held by this Court in an action of unlawful entry and detainer that, where a party is in the actual possession of a part under a *bona fide* claim and color of title to the whole, he has a sufficient possession of the residue of the tract to entitle him to recover possession thereof against a wrong-doer who enters upon such residue, and who has not the right of entry thereon. But the owner of such residue, or those authorized under him, may lawfully enter upon such residue without force and hold the same. *Moore* v. *Douglass*,14 W.Va. 708." *Duff* v. *Good*, 24 W.Va. 682. This applies the rule in ejectment cases to actions of unlawful entry and detainer. It allows a recovery by a *bona fide* claimant, having good title, or having color of title, in possession of part of the land he claims, against one who unlawfully, that is, without right, enters upon another part of the same tract lying beyond the enclosure of the owner. In other words, the actual possession of the claimant, occupying a part of the land claimed, extends to the whole of the tract and legally covers every part thereof not in the actual possession of some other person. *Garrett* v. *Ramsey*, 26 W. Va. 345. In *Moore* v. *Douglass*, 14 W. Va. 708, 732, the law is summarized by JUDGE HAYMOND as follows: "The nature of the possession, to which this summary remedy applies, is not confined to a possession by actual occupancy or enclosure; it applies to any possession which is sufficient to sustain an action of trespass. Title draws

after it possession of property not in the adverse possession of another. Actual possession of a part of a tract of land, under a *bona fide* claim and color of title as to the whole, is possession of the whole, or so much thereof as is not in the actual possession of others. This is the general principle and it applies to the remedy in question."

Title may be acquired by grant or by adversary possession. The latter is a prescriptive title or right, presupposing a valid grant, and deriving its strength and virtue from the statute of limitations, barring the remedy. In order to acquire such a title it is not necessary to have the whole of the tract of land actually enclosed or in actual occupation. It suffices that some part of it be in actual, open, exclusive and continuous possession under color of title. If the entry or possession be under color of titie, such as a deed, or a patent, defining the boundaries of the tract, a part of which is so actually occupied, such actual possession extends to the exterior bounds of the tract as defined by the deed or other instrument under which possession is taken. Since title to the whole tract may be thus acquired by holding possession of a part only, the actual possession must be deemed to extend to the whole tract during the entire period required for the ripening of the possession into a perfect title. Therefore, for the purpose of determining the right of possession, in a summary proceeding, such as this, as well as in an action of ejectment, such possession must extend to the limits of the entire boundary. Nothing can disturb this possession, or work an ouster of the holder thereof, but an actual entry by some other person upon some part of the tract. Thus, in the case of an interlock, if the owner of the elder title be in the actual possession of a part of the land covered by his patent, but outside of the interlock, and the holder of the junior patent be in possession of a part of the land covered by his patent, but outside of the interlock, the actual possession of the holder of the better title is deemed to extend to, and cover, every part of the interlock. Strict adherence to this common law rule would limit the adverse possession of the junior patentee within the interlock to his enclosure or the land actually occupied, his *pedis possessio*. As this would work great hardship and injustice, the courts have so far modified it as to make the

actual possession of the junior patentee within the interlock extend to the whole thereof, provided the senior patentee has not also a *pedis possessio* within it. See *Garrett* v. *Ramsey*, 26 W. Va. 345, 375, opinion of JUDGE SNYDER. Hence, if the claimant under the junior patent is in the actual possession of some part of the interlock, his possession is deemed to extend to every part thereof. If, on the contrary, the claimant under the older patent is in possession of another part thereof, then the possession of the former extends to all the land in the interlock not in the actual possession of the other party. If, in any one of the instances just stated, the relation of the parties to one another and to the land be maintained for a period of ten years, their respective titles will be determined and fixed by their possessory holdings, independently of the rights which their title papers appear to vest in them.

In ejectment law, however, a possession for less than ten years is utterly worthless and unavailing as a basis of recovery. It must go down before a good paper title. But, if it has continued for ten years, it will prevail over a perfect paper title; and, though it be for a period, less than ten years, the land cannot be recovered against it, in ejectment, unless the plaintiff shows title in himself. That the occupant is a mere trespasser on the lands of another person does the plaintiff no good, unless he is such other person. Mere color of title, without ten years possession under it, is worthless to the plaintiff in ejectment, however long he may have been in possession, short of said period.

By parity of reasoning, certain similar conclusions are attained in the law governing the action of unlawful entry and detainer. In this law, the period of limitation is three years. A wrongful possession, for a period of less than three years, is, therefore, worthless to the defendant, whether he holds under color of title or without a shadow of title, if the plaintiff show good title in himself. But his actual possession, no matter how taken, will avail him as a good defense against all persons who are unable to show title or a right of entry. No person, demanding possession of him, under a mere color of title, can recover from him. If he holds, not under color of title, but under a mere claim of title, there being no written instrument defining the limits

of his claim, his right of possession is limited to the *pedis possessio*, his actual enclosure. But if he holds under color of title, it extends to the boundaries therein defined. And, in either event, if he has had such possession for a period of three years, it is a good defense against the world in an action of unlawful entry and detainer. The statute does not allow a recovery of the possession from a defendant who has been in possession for that period of time, although the plaintiff has a perfect paper title to the property. He may recover, but not in such action. He must resort to his action of ejectment. *Billingsley* v. *Stutler*, 52 W. Va. 92.

In applying these principles, it is to be observed that the defendant relies upon a patent issued in the year 1786, covering all the land in controversy, as well as a number of deeds purporting to give title to the same land. These seem to vest a perfect paper title in the defendant, and such title, without actual possession, puts every foot of land within the boundaries fixed by the paper title constructively in the possession of the owner. This possession cannot be broken except by the actual possession of some other person within those bounds. The two hundred acre tract is not an interlock nor lap made by a junior patent, covering it and other lands beyond the limits of the Young survey. It lies wholly within it. If it were such a conflicting patent, and a claimant thereunder held possession, under it, of some part of the land included within it, but outside, and beyond the limits, of the Young survey, such possession would not break the possession under the Young patent. It requires actual, hostile possession within the Young patent to do that. But if there were possession, within the Young survey, of some part of the land, covered by the Perrine patent of 1855, then such possession would be regarded as extending to the limits of said two hundred acre patent, provided some part of it were not in the actual occupation of the owner of the elder title. In that case, possession, within the interlock, under the junior title, would be limited to the land actually occupied. It is not pretended that the possession of the adjoining seventy-five acre tract by Andrew Perrine could, in any way, affect said two hundred acre tract, until after he had obtained the patent for it in 1855. At that time, the holder

of the Young patent, for anything that appears in this record, had valid title to all the land lying within the boundaries thereby defined. Such title drew to it the right of possession and the owner thereof had constructive possession of the whole of said tract, including the two hundred acres. Nothing short of an actual entry upon, and taking possession of, some part of that land could destroy that possession or work a disseizin of the owner of the land to which it extended. By obtaining a patent for a part thereof, Perrine did no act upon the land, took possession of no part of it, did nothing on it which gave any notice whatever of an adverse claim. To work a disseizin or ouster, it is not enough to set up a mere claim by obtaining a deed or patent or otherwise. It requires an adverse holding, actual occupation of the land, and such as is calculated to give notice. Perrine's continuous occupancy of the seventy-five acres, after obtaining the patent for the contiguous two hundred acre tract, did not give any notice. If possession of the latter tract at all, it was silent *clam* possession, not in. any way apparent. His recorded muniment of title, if recorded, was notice only of the holding of paper title, or color of title, not of possession.

The court below, in giving the instruction complained of, assumed that the case of *Overton* v. *Davisson*, 1 Grat. 211, justified its action. That case does say "Upon the question of adversary possession, it is immaterial whether the land in controversy, is embraced by one, or several coterminous grants of the older, or younger patentee; in either case, the land granted to the same person by several patents, is to be regarded as forming one entire tract." The principle was applied by this Court in *State* v. *Harman*, 57 W. Va. 447, (50 S. E. 828), but it is to be observed that neither of those cases presents the same state of facts that appears in this case. There was an actual possession, under the junior title, within the boundaries of the senior title. Close attention to the terms in which the proposition is stated, and its logical connection with other principles enunciated in the decision, makes it manifest that, in the case of an interlock, the claimant must put his foot on some part of the land in controversy, and that it is not enough to make his actual enclosure or perform other acts of dominion, on land claimed by him outside of the interlock. The rule applies "upon the question

of adversary possession." Such possession never occurs until there is a disseizin or ouster of the owner. To effect that, an actual, not merely a legal or constructive, entry must be made within the bounds of the title to which adverse possession is asserted, and the possession relied upon must be there only, or there as well as on other portions of the junior grant, lying outside of the interlock. In other words, possession of part is not possession of the whole, if the junior grant conflicts with the senior, unless the actual possession itself is within the interlock, as shown by improvements, or other sufficient acts of dominion, done on the interlock. See points 4, 8 and 9 of syllabus in *Overton's Heirs* v. *Davisson*. The proposition is plainly stated in *Taylor's Devisees* v. *Burnsides*, 1 Grat. 166, 196, by Judge Baldwin, as follows: "The question whether the possession of a party be actual, often arises, upon conflicting titles, under the operation of the rule, that possession of part is possession of the whole. Where the abuttals of the conflicting titles are the same throughout, the question is of easy solution, upon the principles already stated; but it is sometimes attended with difficulty where the abuttals are different, in the whole or in part. There the limits of the one title are either embraced in the broader limits of the other; or the limits of the two conflict, and cause an interlock. Take, for example, the case of two patents thus interfering. If the junior patentee settles within the boundaries of his grant, but outside those of the older patent, in such case, I think, he gains thereby no actual possession of the land in controversy, whether the possession of the older patentee be actual, or constructive only. For though where there is no controversy, the rule that possession of part is possession of the whole, is to be taken in reference to the entire tract; yet where there is a conflict of titles, it is to be taken in reference to such conflict. And without actual possession of some part of the land in controversy, the junior patentee can gain no possession of the subject, against the better right of the older patentee. This, I consider, perfectly just and reasonable; for otherwise the lawful owner might be disseized not only without his knowledge, but without the means of acquiring it." In *Sulphur Mines Co.* v. *Thompson*, 93 Va. 321, the proposition is declared to be settled law. In *Overton* v. *Davisson*

and other cases in which the contiguous tract rule has been applied, the possession was adverse, hostile, within the bounds of the elder patent.

To show that Judge Baldwin, in delivering the opinion in *Overton* v. *Davisson*, did not mean to express any views inconsistent with what has been hereinbefore asserted, as to the necessity of actual possession, to work a disseizin or ouster of an elder patentee, or, in other words, to destroy his constructive possession, the following is quoted from his opinion in that case: "The court is further of opinion, that where lands have been granted by the Commonwealth to different persons, by conflicting patents, the junior patentee cannot, under any circumstances disseize or oust the older patentee from, or acquire an adversary possession of, the land in controversy, but by the actual occupation of some part thereof, by acts of ownership equivalent to such actual occupation; and that while such patented lands remain completely in a state of nature, they are not susceptible of a disseizin or ouster of, or adversary possession against, the older patentee, unless by acts of ownership effecting a change in their condition." Nothing in any decision warrants a departure from this principle. On the contrary, it has been uniformly recognized and enforced. *Turpin* v. *Sanders*, 32 Grat. 27; *Koiner* v. *Rankin*, 11 Grat. 420; *Kincheloe* v. *Tracewell*, 11 Grat. 587; *Taylor's Devisees* v. *Burnsides*, 1 Grat. 165; *Cline's Heirs* v. *Catron*, 22 Grat. 392; *Ilsley* v. *Wilson*, 42 W. Va. 757; *Garrett* v. *Ramsey*, 26 W. Va. 345; *Congrove* v. *Burdett*, 28 W. Va. 220. This is radically inconsistent with the other proposition in *Overton* v. *Davisson*, as interpreted by the attorney for the defendant in error. The rule was applied in *Rich* v. *Braxton*, 158 U. S. 375, *Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 417, and *Ewing* v. *Burnett*, 11 Pet. 41, but, in those cases, the possession relied upon was within the boundaries of the land actually in controversy.

In *Harman* v. *Ratliffe*, 93 Va. 249, the Virginia supreme court of appeals made a distinction between *Overton* v. *Davisson* and such a case as is presented by this record. Point 2 of the syllabus says: "Where the State has, by conflicting patents, granted uncleared lands, which adjoin the home tract of the junior patentee, the possession by the junior

patentee of his home tract, claiming possession of the land granted by the conflicting patents, is not extended to the lands thus granted so as to give him adverse possession as against the senior patentee."

Our conclusion, from the foregoing examination of the question and review of the authorities bearing upon it, is that the court erred in giving said instruction No. 4.

To break the force of the evidence for the defendant, as to its possession by tenants under lease, the court, at the instance of the plaintiff, gave the following instruction: "The court further instructs the jury that possession by tenants under a writing limiting the tenants to any particular part of a tract of land, limits the possession to that particular part and does not constitute possession of any land outside of the limit of the contract under which the tenant holds, and this is true even if the contract does provide that the tenant endeavor to prevent trespass to other parts of the land." The leases were all very similar and gave to the lessees, respectively, the use of the land which was then in their possession and contained an express stipulation that they were to have the use of only those parts of the land as then under fence and in their actual occupancy. By them, the tenants were bound neither to cause, nor permit, any waste by the cutting or removal of the timber or otherwise, and to promptly notify the lessor of any acts of trespass upon any of the land. No authority is produced for the proposition stated in the instruction, and it seems to be contrary to reason as well as legal principle. What a man may do himself, in the matter of taking and holding possession of real estate, he may do by another. As hereinbefore shown, actual possession of any part of the land is possession of the whole thereof. This results from natural limitations upon the power of occupation. No man can be in the actual physical occupation of all his lands at one time, unless he has them all under fence or in cultivation, a thing very unusual in this country of vast areas of land, far exceeding the requirements of actual occupation and cultivation. In that respect our lands are out of proportion to our population. Possession by one's tenant is his own possession. *State* v. *Harmon*, 50 S. E. 828, holds that the possession of a vendee under an executory contract of sale of a tract of land is the possession of the vendee and

extends to the whole of the tract from which the part was sold. It seems to me that a tenancy of a part of a large tract is a much stronger case. The limitation of the lease to a specific part of the tract does not prevent the possession under the lease from being possession on behalf of the lessor, under the title of the lessor, nor of a part of the tract of land claimed under that title. It is an open, notorious and exclusive act of dominion on the part of the lessor, as much so as if he were himself the occupant thereof. We, therefore, conclude that the court erred in giving said instruction No. 6.

The contention that these are harmless errors for which the judgment should not be reversed is not well founded. There is evidence of possession by the defendant. Its sufficiency to sustain a verdict for the defendant, had one been rendered, is a matter with which the Court cannot deal in the present status of the case. It is for the jury first, unless by some proper action, the question is brought before the court. *State* v. *Clifford*, decided at the present term. If the plaintiff had tenants who sold out or attempted to attorn to the defendant, there is evidence of other tenancies of the defendant free from such taint.

The remaining assignment of error is predicated upon the action of the court in refusing to allow the introduction of a contract executed by Margaret C. Brockerhoff and the West Virginia and Pittsburg Railroad Company, purporting to grant and convey to said railroad company a right of way sixty feet wide through her lands on Elk River and Laurel Creek in Braxton and Webster counties. This contract was offered for the purpose of proving that the railroad company had taken possession of the strip of land granted as aforesaid, constructed its road thereon and was, at the time of the institution of this action, and had been for a long time prior thereto, in possession of said strip of land; and it is urged that the court should have permitted it to go in to prevent a recovery by the plaintiff of the possession of said right of way. The usual method by which a defendant relieves himself of the necessity of defending as to a tract of land which he does not hold, is disclaimer. This was not done, but as the defendant was not in possession of the railroad right of way, and the railroad company was not a party to the action,

how either the defendant or the railroad company can be prejudiced or injured by a judgment covering such right of way is not perceived. It takes from the defendant nothing that it owns or claims. As to the railroad company, it is a judgment acquired without citation or hearing, and is, for that reason, null and void. Therefore, there was no duty resting upon the defendant to ward off, by the introduction of this contract, a harmless judgment.

For the errors hereinbefore noted, the judgment must be reversed, the verdict set aside and the case remanded for a new trial.

Reversed.

CHARLESTON

AMMONS v. TOOTHMAN.

Submitted January 16, 1906. Decided February 27, 1906. 59 165 / 65 540

1. MINES AND MINERALS—*Deed to Oil—Exception in Deed.*

A deed conveys oil in land "except a well now producing oil." That well ceasing to produce oil is deepened by the lessee to a different sand rock, and produces oil from it. The exception excepts from the operation of the deed the oil produced from the lower sand rock. (p. 167.)

(COX, JUDGE, Absent.)

Appeal from Circuit Court, Monongalia County.

Bill by Corbly A. Ammons against Charlotte Toothman and others. Decree for defendants, and plaintiff appeals.

Affirmed.

GEO. C. BAKER, for appellant.

MORELAND & GLASSCOCK and CHAS. POWELL, for appellees.

BRANNON, JUDGE:

William R. Shuman and wife owning a tract of land made a lease of it for the production of oil and gas, which lease

came by assignment to the South Penn Oil Company. The lease provided for payment to Shuman of one-eighth of the oil as royalty. Shuman sold half of this eighth of the oil and died owning the other half of the eighth. Under this lease the South Penn Company drilled two wells on the land, one unproductive, the other productive out of what is called the Big Indian sand. This well was 1,900 feet deep, and produced oil in payng quantity. This well was called Well No. 1. On the death of William Shuman and Minerva Shuman, his wife, said half of said eighth oil royalty payable to them under said lease went to three heirs, one of them being Charlotte Toothman. The said tract of land was divided between the three heirs, Charlotte Toothman getting for her share a tract of fifty-seven acres and a fraction; but the oil was not divided, but left in common for the three heirs, the three heirs owning the said half of one-eighth royalty in common. The said producing well was on Charlotte Toothman's separate tract, though the oil therefrom belonged to all three heirs. Charlotte Toothman and her husband made a deed, 6th December, 1897, to Corbly Ammons and Isaac Ammons conveying the said tract of fifty-seven acres in fee, and also conveying one-half of the oil and gas owned by Charlotte Toothman in the entire lands which had been owned by her father and mother, William R. and Minerva Shuman, "except the well that is now producing oil on said land." The language of the deed as to this is as follows: "The second partys is to have one-half of the oil and gas that may hereafter be produced under the land that belonged to Minerva Shuman and William R. Shuman, and the first party reserves the one-half of said oil and gas. This deed means ½ half of the first party interest in said oil & gas, except the well that is now producing oil, on said land." At the time the deed was made said Well No. 1 was producing oil from the Big Indian sand in paying quantity, but later it ceased to produce oil in paying quantity, and the lessee, the South Penn Company, drilled said well from 1,000 to 1,100 feet deeper, down to a lower and different sand rock stratum from the Big Indian, abandoning the latter sand rock. The deeper sand rock or stratum being known as the Fifth sand rock, not known to be an oil producing stratum at the date of the deed, as no wells in that section

of the country had then been drilled to that sand or stratum. Said well on reaching that deeper stratum found oil in paying quantity. The South Penn Oil Company produced oil from this lower stratum and recognized Charlotte Toothman as owning her full share in the oil produced from said lower stratum and delivered it to her credit to the Eureka Pipe Line Company for transportation, and did not recognize Ammons as having any interest in the oil from that well. Isaac Ammons having sold his interest to Corbly Ammons, the latter brought a suit in equity in Monongalia county against Charlotte Toothman and said two companies for discovery and account for the oil produced from said Fifth sand through Well No. 1, and to have a decree against those liable therefor, and to have a decree declaring him entitled to half the share of oil of Charlotte Toothman produced, or to be produced, through said well from said Fifth sand, the bill thus claiming that the deed from Toothman to Ammons reserves only the Toothman share produced from the Big Indian sand and excepted no oil in the lower sand, but that Ammons was entitled to half of that oil. The court sustained a demurrer to the bill as to this claim of Ammons, and he appealed.

The question is, Does that deed convey to Ammons the half of Mrs. Toothman's share of oil coming from the lower sand rock, or does it except the oil produced from that rock through said well, and exclude Ammons from any interest in that oil? The main argument for the position that the deed confers half of Toothman's interest in the oil from the lower sand rock is, that when the well ceased to produce oil it was an abandoned well, it became a dry hole, and that Toothman's estate in it ceased, and she no longer had any estate in it. For this position the case of *Steelsmith* v. *Gartlan*, 45 W. Va. 27, is relied upon, because of its holding "The completion of a non-productive well, though at great expense, vests no title in the lessee." That case refers to the lease. It means that if, under the usual oil lease, a non-productive well is drilled and abandoned, no estate vests in the lessee. That is not the question or test here. No one can claim that under such lease, if the lessee go on in further exploration, his right is lost. He may go on in a reasonable time. But that is not the question here, because when that well

produced oil in paying quantity from the upper sand, an estate vested in the South Penn Company and remained vested in it. The bill admits that that well produced oil in paying quantity. Therefore, an actual estate vested in the lessee, and though that well ceased to produce oil from the upper sand, the lessee had an estate still under which it had right to go on lower with the well, and did so. The lessee's right was not lost or abandoned, and neither was Mrs. Toothman's right gone. The lessee chose to retain its estate and well by sinking that well deeper, and its right continued and so did the right of Mrs. Toothman. Her right depended on the right of the South Penn Oil Company, followed it, and was measured by it. As long as that Well No. 1 was a well for the lessee, it was also a well for Mrs. Toothman. That well was not abandoned by the company. But the argument is, not that the lease failed, but that the company abandoned the *upper sand;* it did not abandon the lease or lose its estate under the lease, but the claim is, that the company abandoned that well so far as the upper sand was concerned. In other words, it claimed that it abandoned that well. This is a very refined argument—very technical. It is argued that when sunk to a lower sand, a quick change was wrought in that well and it became a *new* well, another and different well from what it had been. This is a very refined and technical argument. It is not a new well, not a different well, in any sense; it is only a deeper well. The 1,900 feet which had been bored remained still a part of that well, its greater part. The hole was the same hole in the ground; its identity was not gone. The mouth of the well from which the oil issued was the same. The oil from the lower sand came through that 1,900 feet and issued from the mouth of the well, from the Fifth sand, just as it had from the Big Indian sand. The 1,900 foot depth and the mouth of the well were used and utilized in the production of the oil from the lower sand. What if the oil came from the lower sand? It came through the 1,900 feet, and issued from the old orifice. I cannot see that the identity of the well was lost. A well remains the same well though continued down into the earth deeper. To say that Toothman was tied down by the exception in the deed to oil coming from the Big Indian sand is unreasonable. Where is the language

in the deed that does this? The sinking of the well lower was an eventuality or a contingency not unlikely to occur, and we may say might be regarded as probable. Oil wells are often sunk deeper. The claim is that Mrs. Toothman in that exception in her deed had her mind only on oil produced from the upper sand, and intended to except only that. Where are the words to speak that intent? The exception is of that well, meaning all oil produced through it, and Ammons was excluded from ownership in that well. The plain intent was to exclude him from any interest in oil produced from that well, come from where it might in the future. Mrs. Toothman may fairly be said to have intended to retain her interest in all oil coming through that well so long as the lessee should operate it by producing oil through it, in whatever manner the lessee might operate that well. There was the lessee actually operating the well at the date of the deed, and to whatever depth the lessee might sink that well, to that depth also the exception in the deed must go. Did the parties mean anything else? In the first place, here is a broad exception of that well, excluding Ammons from oil produced in it. It is an exception not merely a reservation. Strictly speaking an exception keeps the deed from passing the thing excepted, a reservation reserves something out of the thing granted. Mrs. Toothman never granted oil in, or to come through, that well. That exception means that the deed was not intended to confer on Ammons any right at all as to that well or its product. I say there is that broad language. Such are the words of the deed speaking the intent under all circumstances. But suppose we seek probable intent outside the words. Suppose Mrs. Toothman had been told that the deed would except only the oil from the upper sand. Do you think she would have agreed to it? Suppose she had been told that if the lessee should bore lower and get a rich stream of oil from a rich sand rock, she would have no interest in it. Think you she would have agreed to it? Did either side mean it? And yet great stress is laid in argument upon a supposed intent to limit the exception to the Big Indian sand, and to make the deed pass to Ammons from the Fifth sand. I say the inference is very strong against any such intent. If we grope about for intent outside the words of the deed, it is much more reasonable to say that Mrs.

Toothman intended to retain all her oil in that well, come from what depth it might, than to limit herself to one sand rock and give to Ammons all oil below it. The deed does not mention any sand rock. To say that it refers to only one is going outside the deed and making the deed do what its words do not do. I would emphasize the fact as important that when that deed was made the well was in actual operation producing oil, with a vested estate in the lessee to continue that well to a lower depth, and as Mrs. Toothman excepted that well her right was co-equal with that of the lessee and followed the lessee's right as long as it existed. It was not a new well to the lessee, neither was it a new well as between Mrs. Toothman and Ammons. A lease in 1831 was made to mine coal in lands. Under it two seams were opened and mined. In 1834 a will gave the widow of the lessor "rents, issues and yearly proceeds for life" in the lands. In 1856 the lease being nearly expired and the coal in the two seams which had been worked becoming exhausted, a new lease was made, and under it the mine was sunk to another seam of coal, the Brockwell seam, at a depth of 118 fathoms below the seam which had been opened. That seam was utterly unknown until 1846. The question was, did the widow have right, as life tenant, in that lower seam of coal under the rule that a life tenant can work to exhaustion on a coal mine *opened* when the life estate vests. It was claimed, as in this case, that this different seam of coal far below the upper ones was a new mine, not one opened at the date of the commencement of the life estate. The widow was held entitled to the rents of the lower vein, because the deeper excavation was only a continuance of the old mine. The opinion says: "I am clear that this is the old mine; *Clavering* v. *Clavering*, (*a*), did not confine the right to one seam. If there be one shaft by which you can work five seams, and which are all let, but only one is worked at first, I am of opinion, that when the lease begins to work the other seams it cannot be said to be opening a new mine, I have no doubt that it is substantially and practically the old mine. I agree, that if a man has opened a shaft for winning coal, and he finds in another part of his estate mines of lead or ironstone, which could not be got by means of the old shaft or opening, this would be opening a new mine; but here the lessees were at

liberty to open other shafts, and to work all coal and ironstone, and I think that this is only a repetition of the working of the old mine." *Spencer* v. *Scurr*, 31 Beavan's Rep. p. 337. Just so in this case. Here the South Penn had bored to a certain stratum or seam at the date of this exception. It went on down to another stratum and the rights of Mrs. Toothman went with the South Penn's rights into the lower oil stratum. Mrs. Toothman intended to keep to herself all of her share of the oil produced in that well then being worked by the lessee, and neither of the parties contemplated that her right should stop at the Big Indian sand. No such idea was in their heads. The deed does not do so.

I cite *Couch* v. *Puryear*, 1 Randolph 258, not as conclusive, but as *leaning* in favor of the position above taken. The syllabus says the life tenant may sink new shafts into the same veins of coal, and that he may go through a seam already opened, and dig into a seam that lies under the first. The seams were separated by slate. How thick does the slate have to be to make it another vein? Certainly the case goes that far. But the answer set up right under the life tenant "to sink new shafts and pursue the coal in every direction and to every extent they may think proper to obtain the coal." The answer claimed that all the coal in the land was part of the same mine. The attorneys argued that the word *mine* "included the whole mass or vein of coal contained within the land." The court simply dissolved the injunction specifying no reason. So, we may say the court took this view. The syllabus was not prepared by the court. If there be a shaft into a vein of coal, and the life tenant exhaust it, must he do without coal when by extending his shaft to a lower vein he can get it? The words "the well now producing oil" are not descriptive of the oil; they do not merely mean the oil now being produced; they do not describe the oil to be produced from any particular sand; but they were used to describe and identify the well. They were intended to excluded Ammons from a particular well.

Decree affirmed.

Affirmed.

CHARLESTON

BROWN v. CLICK.

Submitted January 30, 1906. Decided February 27, 1906.

1. CANCELLATION OF INSTRUMENTS—*Evidence.*
   To cancel a note and deed of trust to secure it on the claim that they were given for a contemplated loan, and that the loan was never made, the oral proof must be very full, clear and convincing. (p. 173.)

2. WITNESS—*Deceased Person—Agent.*
   An agent contracting in behalf of his principal with a person since deceased is a competent witness in behalf of his principal against the estate of the deceased party to prove the transaction. (p. 174.)

Appeal from Circuit Court, Putnam County.

Bill by H. C. Brown and others against George Click and others. Decree for plaintiffs, and defendant Click appeals.

Reversed.

RANKIN WILEY and W. R. GUNN, for appellant.

J. W. ENGLISH and CHAS. E. HOGG, for appellees.

BRANNON, JUDGE:

H. C. Brown and his wife, E. R. Brown, made a note to C. Click for $400 and a deed of trust on a house and lot to secure it, and when the trustee gave notice of sale under the trust they filed a bill of injunction in the circuit court of Putnam county to enjoin the sale and cancel said note and deed of trust, and a decree was entered annulling said deed of trust, from which decree an appeal has come to this Court.

The statement of the bill is, that both Brown and his wife owned separate real estate, and that a suit was brought by a creditor of Brown to subject the real estate of both him and his wife to his indebtedness, and that an agreement was made with Click to obtain a loan from him of four hundred dollars, in case the result of the suit should render it necessary, and that the note and deed of trust were made and delivered to one Wartenburg, who took them to Click and left them with him to raise money upon, should it become necessary to pay such indebtedness; but that while the result of the suit was

to subject H. C. Brown's property, it did not subject his wife's property, and he concluded to let his property go, and not encumber his wife's house and lot, and so Click never furnished any money at all.

The heavy burden of proof to defeat these evidences of debt rests on the plaintiffs. If we do not call for full proof in such cases, what do solemn writings proving debts amount to, especially when their owner's lips are closed in death? This plain principle of justice stares us in the face at the outset of the case. Click held these papers five years and a half, and not until his death do we hear of their defence. Is it not most remarkable that both Brown and his wife would let those papers lie so long in Click's hands? Strange that the wife would so long let them hang over her little home, even if her husband would be so negligent. Counsel for Brown says that it counts against Click's estate that he let the debt stand so long and did not collect interest. He was a money lender and would prefer the debt to stand. I think the fact argues more strongly against Brown. Why leave these dangerous papers so long in Click's hands, when it was a deep concern on the part of the Browns to demand them? The possession of these papers is a controlling factor in the case. The evidence of Brown and wife that they received no money counts for naught against a dead man's estate. Wartenburg's evidence sustains the bill, he saying that the Browns got no money of Click. Wartenburg is a brother-in-law of Brown, and displays active interest in the matter. He is contradicted by Jacob Eyler, who swears that he saw Click count out $400 to Wartenburg to be delivered to the Browns, and saw Wartenburg deliver note and deed of trust to Click. After Click's death when his property was being listed this note was found, and a question arose as to its solvency, and a witness said to Wartenburg that he had written it and ought to know about it, and Wartenburg said the note was good and bound the property of Mrs. Brown. Two other witnesses swear to this. Reiber's evidence is that he heard Wartenburg say that he thought Brown had paid the note, and that it must have been four or five years since they got the money. The fact that the note dates 17th January, and the deed of trust the 27th is a circumstance against Browns, indicating that Click would not take the personal

note and then later the trust was made. And early in the case, it strikes anyone as highly improbable that Wartenburg, a business man of capacity, an attorney, would leave these papers in Click's hands, he living sixty miles distant, before any money was got. Stranger still that Brown and his wife would consent to it. People are not often so negligent in a matter so important. Strange, too, that Wartenburg would, as the friend of Mrs. Brown, make a trip of that distance before any suit was brought to charge her property. The debt that was to come on Mrs. Brown's property was only $180. Why arrange to borrow $400? This is an answer to that pretense. It speaks strongly against Wartenburg's evidence that when he was present at the inspection of Click's papers after his death, he did not declare that the Browns had got no money of Click. Why did he not, then and there, say that that note and that deed of trust were not valid? If he knew that he had taken them to Click to be effective only in case money should be borrowed of him; if he had not gotten any money from Click, why did he not, on the spot, protect his sister-in-law from an unjust demand? He does not pretend that he made any such declaration. But he said the debt was good. He said the trust was solvent, treating it as a just debt.

The question is raised whether Wartenburg being an agent of the Browns is competent to give evidence against Click's estate. We think that his evidence is competent. Section 23, chapter 130, Code 1899, declares that no person shall be excluded as a witness by reason of interest, thus abrogating the common law rule. The section states specific exceptions to competency, and does not disable on account of agency. To be incompetent the witness must fall within an exception. It is held that an agent contracting with a party since dead is competent in behalf of his principal to prove the contract. *Clark* v. *Tias*, 173 Mo. 628, 73 S. W. 616; *Dawson* v. *Mombles*, 78 S. W. 823.

We reverse the decree, dissolve the injunction and dismiss the bill.

Reversed.

CHARLESTON

STATE v. TRAIL.

59 175
f63 551

Submitted January 30, 1906. Decided February 27, 1906.

1 HOMICIDE—*Evidence—Declaration of Decedent.*

In a trial for murder, the uncommunicated declaration of the deceased of his purpose to have illicit intercourse with the daughter of the defendant, which he declared he could do "if he could get the old man drunk," is not admissible in evidence. (p. 177.)

2. SAME—*Defenses—Burden of Proof.*

In the trial of an indictment for murder, if the homicide is proven to have been committed by the defendant then the presumption of murder in the second degree arises against the defendant and the burden of proof rests upon him to make such defense as will reduce the crime below such degree, or as will justify the act, and such defense may be found in the evidence adduced by the state and that of the defendant and all the circumstances of the case. (p. 179.)

3. WITNESSES—*Credibility—Instructions.*

Where a witness in a trial of a case makes statements in material matters touching the issue inconsistent with former statements made by him concerning the same matters, the party against whom such witness testifies is entitled to have the jury instructed that if they believe from the evidence in the case that the witness made inconsistent and contrary statements concerning such matters, then the jury has the right to disregard the whole testimony of such witness, or give it such weight as to which they think it is entitled. (p. 183.)

4. CRIMINAL LAW—*Circumstantial Evidence.*

Syllabus, points 3, 4 and 5, *State* v. *Flanagan*, 26 W. Va. 116, approved and applied. (p. 184.)

Error to Circuit Court, Putnam County.

Thomas C. Trail was convicted of murder and brings error.

Reversed.

J. L. STEVENS, JOHN L. WHITTEN, A. P. FARLEY, and CHAS. E. HOGG, for plaintiff in error.

C. W. MAY, Attorney General, for the State.

MCWHORTER, PRESIDENT:

Thomas C. Trail was indicted in the circuit court of Putnam county for the murder of Peter Bowles and convicted of

murder in the second degree and sentenced to the penitentiary for the period of six years.

Upon the trial defendant by counsel took five bills of exceptions numbered 1 to 5 respectively. Bill of exceptions No. 1 includes all the evidence taken in the case; No. 2 calls in question the instructions given for the State; No. 3 goes to the refusal of the instructions offered by the defendant; and No. 4, which is made the subject of the first assignment of error in the petition for writ of error, relates to the rejection of evidence offered on behalf of the defendant. The evidence sought to be introduced was that of witness C. E. Rogers giving a statement made to him by the deceased; witness says: "It was some days before this occurrence, probably two or three weeks I could not be positive about that." The statement which was excluded from the jury was: "Mr. Bowles told me that he were going down to Mr. Trail's to f—k Lona; he said he knowed he could, if he could get the old man drunk. That is about all I remember that Mr. Bowles said directly in that." It is not contended that this statement was ever communicated to the defendant but on the other hand it is admitted that it was not communicated to him. In *State* v. *Evans*, 33 W. Va. 417, it is held: "Evidence of communicated threats is calculated to shed light upon the mental attitude of the prisoner towards the deceased when the homicide occurred; uncommunicated threats are evidence of the mental attitude of the deceased towards the prisoner. Both are admissible." The words attributed to Bowles were not a threat against, nor to do violence to the defendant but a statement of what he proposed to do with defendant's daughter, first getting the defendant drunk. It is shown by the record that the defendant and the deceased were good friends, the prisoner himself spoke of him as his friend and said he had always taken him to be his friend. Counsel for defendant do not cite any authority for the admission of declarations of this character but only as to threats of violence, and I find no such authority. In *Newland's Case*, 27 Kan. 764, it is held: "In a criminal prosecution for assault and battery the defendant has no right to put in evidence the declaration of the party assaulted made before or after the affray in reference thereto." In *State* v. *Zellers*, 7 N. J. L. 265, it is held: "A conversation of the deceased with a third

person, or acts of the deceased which never came to the knowledge of the prisoner cannot be received in evidence." I am unable to see how the defendant is prejudiced by excluding this declaration of the deceased which was not communicated to the defendant and of which he had no knowledge, and consequently could in no way be affected by it. The only effect its introduction could have had, if any, would be to lower the character of the deceased in the estimation of the jury, and have a tendency to lead the jury to believe the purpose of the visit of the deceased to the home of the defendant was to debauch his daughter when they should consider this declaration in connection with the evidence of deceased's conduct toward the daughter on the night of the killing, but it in no way tended to prove enmity in the mind of, or malice of the deceased towards the defendant himself. It was properly excluded.

The second assignment of error is the giving of instructions for the State as set out in bill of exceptions No. 2, exceptions going to each and every one of said instructions. The first instruction is defining the reasonable doubt. The second instruction as modified and given is as follows: "The court further instructs the jury that the credibility of witnesses is a question exclusively for the jury; and the law is that where a number of witnesses testify directly opposite to each other the jury is not bound to regard the number of witnesses who may have testified on one side as against the number who testified on the other side; the jury have the right to determine from the appearance of the witnesses on the stand, their manner of testifying and their apparent candor and fairness, their apparent intelligence or lack of intelligence, the interest of the witnesses in the result and from all other surrounding circumstances appearing on the trial determine which witnesses are more worthy of credit and what is relative weight of any such testimony, and to give credit accordingly." While these two instructions are included in the bill of exceptions they are not relied upon as being erroneous in the briefs of counsel for the defendant and are deemed fair and proper. Instruction No. 3 is objected to because it is claimed that it clearly deals with the weight and value jurors should give to certain testimony. The instruction reads as follows: "The court further instructs the jury

that in determining the weight to be given the testimony of different witnesses in this case, the jury are authorized, to consider the relationship of the witnesses to the parties if the same is proved; their interest if any in the results of this case, their temper, feeling or bias if any has been shown; their demeanor whilst testifying; their apparent intelligence and their means of information, and to give such credit to the testimony of such witnesses as under all the circumstances such witnesses seems to be entitled to." The instruction does not convey to the minds of the jury any indication of the weight given to the testimony by the court of any witness, but simply instructs the jury what matters may be taken into consideration by them in considering the testimony of witnesses who are proven to be within certain relationship to the parties, and to consider the interest of such witnesses in the result of the case, "their temper, feeling or bias if any has been shown; their demeanor whilst testifying; their apparent intelligence and their means of information," and in view of all these things to give such credit to the testimony of such witnesses as they might seem to be entitled to. Nothing can be drawn from this instruction to indicate the bias of the court as touching the weight of the evidence of such witnesses. Counsel for defendant cite in support of their position in regard to Instruction No. 3, point 20 Syl. in *Ward* v. *Brown*, 53 W. Va. 227: "The giving of erroneous instructions bearing upon the weight and value of certain testimony when the evidence is contradictory is cause for reversal." This raises the question, what is an erroneous instruction bearing upon the weight and value of certain testimony? I take it that it is an instruction not leaving the whole question of the weight of the evidence with the jury as in this case, but one which conveys to the mind of the jury the opinion of the court in relation to the weight of such testimony, or an instruction which leads the jury to the conclusion that the mind of the court is that the weight of such testimoy preponderates the one way or the other, but there can be no objection to the court instructing the jury in relation to all the elements which are proper to be taken into consideration by the jury in weighing the testimony. It is contended that Instruction No. 4 should not have been given, at least without giving No. 10 asked for by the defendant in connection there-

with. Instruction No. 10 is as follows: "The jury are further instructed that if they believe from the evidence that Thomas C. Trail was not attempting to take the life of Peter Bowles at the time of the cutting, but was defending himself from the assault made upon him by Alfred Maynard or Peter Bowles, or both of them, then this would be substantial denial of criminal intent upon the part of the said defendant, and throws upon the State the burden of proving such intent beyond a reasonable doubt, and the accused is not required to sustain such defense by a preponderance of testimony, and the jury should find the defendant not guilty." Instruction No. 4 is point 11 in the syllabus of the case of *State* v. *Cain*, 20 W. Va. 679, and given in *Hill's Case*, 2 Grat. 595. And No. 10 is misleading; the burden of proof was already on the State to prove criminal intent beyond a reasonable doubt, the criminal intent is the gist of the offense and without such proof full and clear no indictment for crime could be sustained. If the homicide is proven to have been committed by the defendant then the presumption of murder in the second degree arises against him and the burden then falls on him to make such defense as will reduce the crime below such degree, or, as will justify the act, and such defense may be found in the consideration of the evidence and case made by the State in connection with that adduced by the defendant. This is a binding instruction, not as to the degree of crime, but that if the jury should believe that defendant was defending himself from the assault of Maynard, or Bowles, or both of them, it would necessarily amount to justifiable homicide. Defendant might have been defending himself against an assault, and yet not justified in killing his assailant, that depends upon all the evidence and the circumstances. No. 4 was properly given and No. 10 was properly refused. Instruction No. 5 given for the state is in the following words: "The court further instructs the jury that to convict one of murder it is not necessary that malice should exist in the heart of the accused against the deceased, if the accused was guilty of striking with a deadly weapon another, and of killing him, the intent and malice may both be inferred from such act; and such malice may not be directed against any particular person, but may be such as shows a 'Heart regardless of social duty and fatally bent on mischief.'"

It is contended by counsel for defendant that the words of this instruction tended to mislead the jury; that "An instruction of this sort is designed for a case in which the party has killed one whom he did not intend to kill, in an effort to take the life of another whom he did intend to kill. It is founded upon the very nature of the case itself and upon public policy, the law embodied in such an instruction having for its end the safety and protection of society. * * * * * * This law as embodied in instruction No. 5 is intended to meet that class of cases where the killing of the particular person was not intended by the defendant, and to show that express malice need not be affirmatively shown against the very party that is killed." And it is contended that in case at bar there was no third party which the defendant intended to kill and in an effort to do so took the life of Bowles. The defendant in his testimony describing his fight with Albert Maynard says: "He punched or knocked me, or something, and I got down, and if I did any harm at all was while I was down, or hurt anybody; I hit something; I was doing what I could. Ques. Who was you trying to hit? Ans. I was fighting Albert Maynard all the time, or I thought I was." Here according to the testimony of the defendant he was in a fight with Maynard and if he ever struck the blow that hurt and killed Bowles it was while down and in the fight with Maynard. So that if the object of the instruction is as contended by defendant's counsel it is entirely adapted to this case, in harmony with the evidence of the defendant himself. It is contended that Instruction No. 7 given for the State, in the following words: "The court further instructs the jury that if they find from all the evidence that the homicide is proven, the presumption is that it is murder of the second degree, and that the burden is on the State of showing that it is murder of the first degree, and upon the accused of showing that it is without malice and is, therefore, only manslaughter, or, that he has acted lawfully, and is, therefore, not guilty," is "ambiguous, indefinite, uncertain, misleading and liable to be misunderstood and misconstrued by the jury to the prejudice of the prisoner and contrary to well established law;" that the presumption of the innocence of the prisoner follows him in every stage of the trial until the State has proven every el-

ement of guilt as charged in the indictment against him beyond a reasonable doubt. Counsel admit that to the mind of a person trained in the law the instruction could be easily explained and the meaning of the court understood but to a jury composed of tillers of the soil it could not be so well comprehended, to such men the instruction as given must have meant "that when a homicide has been proven the presumption is that the prisoner at the bar is guilty of murder in the second degree" &c. This is a reflection upon the intelligence of any jury that might be gathered up in any community in this State. The defendant is on trial for committing the homicide, the homicide is an admitted fact and a fact within the knowledge of all the people connected with the trial and the instruction could not mean that if the jury should find from all the evidence that a homicide had been proven that the presumption would follow that the defendant had committed it, regardless of evidence connecting the defendant with it, simply from the fact that the indictment charged him with the crime. The instruction could only mean that if the homicide had been proven to have been committed by the defendant then the presumption followed as to the degree of murder when it has been proven that a homicide has been committed by the accused, then the presumption arises that the accused is guilty of murder in the second degree, and to elevate it to first degree murder the burden is upon the State and to reduce it below the presumed degree the burden is upon the defendant; and the instruction further says, that if he would justify the homicide it was for him to show that he had acted lawfully and was therefore not guilty. It is further contended that instruction No. 7 is not in harmony with instruction No. 1, given on behalf of the defendant, where the jury is instructed that the defendant is presumed to be innocent of the charge until he is proven guilty beyond all reasonable doubt and that this presumption follows him in every stage of the trial until the State has fully proven every element of guilt as charged to the exclusion of every reasonable doubt and that unless the jury believe from the evidence that the State had so proven every element of guilt, then they should find the prisoner not guilty. The instructions are not out of harmony, No. 7 only instructs upon the presumption of murder in the second de-

gree when the homicide has been proven and only instructs as to one point of the law. It isn't required that every instruction should cover all the points of the law in the case. Instruction No. 7 is good for the purpose for which it was given and is entirely in harmony with defendant's instruction No. 1.

Bill of exceptions No. 3 goes to the refusal of the court to give the instructions Nos. 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15. No. 3 is in the following words: "The court instructs the jury that when one without fault himself is attacked by another, in such a manner, or under such circumstances as to furnish reasonable grounds for apprehending a design to take away his life, or to do him some great bodily harm, and there is reasonable grounds for believing the danger imminent that such design will be accomplished, and the person assaulted has reasonable grounds to believe, and does believe such danger is imminent, he may act upon such appearances and without retreating, kill his assailant, if he has reasonable grounds to believe, and does believe, that such killing is necessary in order to avoid the apparent danger, and the killing under such circumstance is excusable, although it may afterwards turn out that the appearances were false, and that there was in fact neither design to do him some serious injury, nor danger that it would be done. But of all this, the jury must judge from all the evidence and circumstances in the case," and is, under the evidence and circumstances of this case, unobjectionable and should have been given.

Instruction No. 4 offered by counsel for defendant: "The court further instructs the jury that a witness may be impeached, and discredited by prior inconsistent statements, and if the jury believe from the evidence in the case that the witness Albert Maynard made inconsistent and contrary statements concerning the killing of the deceased, Peter Bowles, then the jury has the right to disregard his whole testimony, or give it such weight to which they think it is entitled:" was intended to meet the testimony in the case by which the witness Albert Maynard was contradicted in a material part of his testimony by several witnesses. In his testimony in chief upon the trial he says, when Trail struck Bowles with the knife witness was standing behind a chair, "I took the chair

and went around Mr. Trail and carried the chair between him and me and went out of the house to the draw-bars where the road was; I looked back to see if I could see Mr. Trail and did not see him." That he then set the chair down and crossed over the draw-bars and went to his brother's. Being recalled he was asked about the conversation that he had had with William Hicks at a time and place mentioned and was asked if Hicks did not say to him "that if you were not careful you would swear a damned lie, and that you replied that in a case like this you had to swear. Ans. No sir, I never said any such a thing." And was asked if he did not at the time of the inquest in the presence of James F. Pullin one of the jurors "say that you aimed to strike him with a chair and that the chair hit the joists, and the joists was so low you could not make the lick and that you punched him with the chair and punched him much, and then you carried the chair out with you out of doors." Which statement he denied making. William Hicks being recalled stated that he had the conversation with Maynard about three weeks ago near Colonel Burnside's store in which he stated that in a case like this he had to swear. James F. Pullin, member of the coroner's jury on the 31st of October, testified that "Albert Maynard stated in the presence of the jury upon that occasion that he struck at Thomas C. Trail with a chair and the joists being low the chair struck the joists and that he could not make the lick and that he then punched him with the chair and punched him much." These statements are in direct contradiction of Albert Maynard's account of the affray at the time of the killing of Bowles. The instruction tells the jury that if they believe from the evidence that he made inconsistent and contradictory statements relating to the killing or concerning the killing, then the jury had the right to disregard his whole testimony or give it such weight as they should think it entitled to. Hughes on Instructions to Juries, sections 367–368. Instruction No. 4 should have been given.

Defendant's instruction No. 6 is as follows: "The court further instructs the jury that before they can convict the prisoner, Thomas Trail, they must believe beyond a reasonable doubt that every fact necessary to show the prisoner's guilt has been established by full proof, and if the jury have a reasonable doubt upon any fact necessary to show the guilt

of the prisoner, then they should give the benefit of that doubt, and find him not guilty." It may be presumed that No. 6 was refused because No. 1 given for defendant covered the same point but as the defendant is entitled to have instructions given in his own language when they correctly propound the law, and it is contended that No. 1 given on behalf of the defendant simply relates to the general doctrine or principle that they must believe him guilty beyond a reasonable doubt before they can find him guilty. Instruction No. 6 directs the attention of the jury particularly to the principle which requires proof beyond a reasonable doubt of every fact necessary to show the prisoner guilty and that if they have such doubt upon any fact necessary to show his guilt, then they must find him not guilty. See *State* v. *Flanagan*, 26 W. Va. 116, syl. points 3, 4 and 5. As to instructions Nos. 7, 8, 9, 13 and 15 refused by the circuit court, counsel for defendant say nothing about them in their briefs and do not rely upon them, and they appear to be properly refused by the court. Instruction No. 11 offered by defendant is point 5 in syllabus, *State* v. *Zeigler*, 40 W. Va. 593, which has been overruled in *State* v. *Staley*, 45 W. Va. 792, syl. point 5. As to instruction No. 12, which reads as follows: "The jury are further instructed that if they are satisfied from the evidence that Alfred Maynard was armed with a chair and attacked the defendant, and that the defendant, had reason to believe, or reasonable cause to believe and fear, and that he did believe and fear, that great bodily harm was to be inflicted upon him, and that under the influence of such belief and fear, he struck the blow with the intent to defend or protect himself against Alfred Maynard or Peter Bowles acting together, then the defendant is not guilty." Under the evidence and circumstances of this case this instruction should have been given. The testimony of the defendant is that he was attacked by Maynard with a chair and that he (defendant) was defending himself as best he could. From defendant's testimony he was in great danger and had reason to believe he was in danger of great bodily harm—witness says Maynard was a very powerful man, says that he struck at him with a chair and "if it had not been for the chair striking the joists I don't know what he would have done for me."

It is insisted by counsel for defendant that No. 14 should

have been given without modification as it was offered as follows: "The jury are hereby instructed that a man's house is sacred and his own castle to himself, and if the jury believe from the evidence that Thomas C. Trail was attacked in his own house by Alfred Maynard, armed with a chair or other dangerous weapon, and the said Thomas C. Trail had reason to believe and did believe that he was in danger of losing his life, or in danger of suffering great bodily harm at the hands of his assailant, he is not required to retreat, but may defend his life or person by taking the life of his assailant without retreating; and if the jury further believe from the evidence that Peter Bowles joined Alfred Maynard in the assault on Thomas C. Trail, and in that affray lost his life at the hands of Thomas C. Trail, then you shall find the defendant not guilty." This lacked one essential element in that it left out the fact that he had reasonable grounds to believe and did believe such killing was necessary to defend his own life or prevent great bodily harm. No. 14 as modified, which reads as follows: "The jury are further instructed that if they believe from the evidence that Thomas C. Trail without fault was attacked in his own home by Alfred Maynard, armed with a chair or other dangerous weapon, in such a manner and under such circumstances as to furnish reasonable grounds for apprehending a design to take away his life or to do him some great bodily harm, and that the said Thomas C. Trail had reasons to believe and did believe that he was in danger of losing his life, or danger of suffering a great bodily harm at the hands of his assailant, he was not required to retreat, but had the right to defend his life or person, by using force for force in resisting such attacks and by taking the life of his assailant, if necessary to protect himself from great bodily injury or to save his life from the threatened injury, and if the jury further believe from the evidence that Peter Bowles joined Alfred Maynard in the assault on Thomas C. Trail, and in that affray lost his life at the hands of Thomas C. Trail, then you should find the defendant not guilty, but all of this the jury must decide from all the evidence in the case:" is bad for the reason that it says the defendant "had the right to defend his life or person by using force for force in resisting such attacks and by taking the life of his assailant if necessary to protect himself from great bodily injury or to save

his life from the threatened injury." Under this instruction the defendant would have to prove that the killing was absolutely necessary and not that he had ground to believe and did believe it necessary to protect himself from great bodily harm, or to save his own life. So that neither No. 14 as offered by defendant nor as modified and given was correct.

The fourth assignment of error goes to the mis-conduct of the jury in separating, &c., as set out in bill of exceptions No. 5, and the fifth assignment of error, that the court erred in refusing to set aside the verdict and award defendant a new trial on the grounds that the verdict was contrary to the law and the evidence. As the case must be retried it is deemed unnecessary to discuss these last mentioned assignments of error.

For the reasons herein stated, the judgment of the circuit court is reversed, the verdict of the jury set aside and the case remanded to the circuit court for a new trial.

Reversed.

BRANNON, JUDGE:

If it is intended to decide that defendant's instruction six should have been given, I do not agree to it. If the question of the homicide were involved, it would be good; but that is conceded, not a question of contest. This instruction is capable of being construed to say that unless the state disproves self-defence beyond reasonable doubt, the defendant must be acquitted. It misleads. The only question was, is the prisoner entitled to acquittal on the plea of self-defense? The *Flanagan case* has no import in this matter. It was whether the accused was guilty of the *corpus delicti* on circumstantial evidence, not self-defence.

Instruction fourteen as modified is likely ground for reversal; and yet I realize that its defect may have extended little influence, taken with other instructions.

SANDERS, JUDGE, (*dissenting in part*):

I concur in the conclusion reached, to reverse the judgment and grant the prisoner a new trial. But I cannot consent that the evidence of the witness, Rogers, wherein he relates a statement made to him by the deceased, to the effect that the deceased told him that he was going to Trail's home to

debauch his daughter, and that he knew he could do so if he could get the old man drunk, is inadmissible. I think this evidence admissible, as corroborative of the testimony of the defendant, if for no other purpose. It is true this statement was not communicated to Trail, yet, at the same time, if the statement was made, it goes to show the previously formed intention of the deceased to go to the home of Trail and attempt to debauch his daughter. There is a conflict in the evidence as to the circumstances under which the killing was done. The state endeavors to show that while Bowles was standing with his back to the fire. Trail came into the room, walked up to him and stabbed him, without any provocation or justification, while, on the other hand, Trail claims that it was in defense of his home and the virtue of a member of his family. He claims that shortly before the killing, he was told to go home, that Bowles was making improper advances toward his daughter, and on his arrival, Bowles assured him that he had the highest regard for him and his family, and that he did not intend anything by what he had done; and Trail says he became angry at that time, but with these assurances the matter rested in abeyance for a short while; that he went into the house and sat down by the fire and dropped off to sleep, and shortly afterwards was awakened by a noise, and found Bowles making improper and indecent advances to his daughter, who was at that time lying upon the bed in the room where they were. · This theory of the case the prisoner had the right to present to the jury, if not for the purpose of justification, certainly to negative malice, and to show that the killing was done in the heat of passion. Then if I am correct in asserting that this could be given in evidence for the purpose of showing hot blood, then it seems to me clear that any evidence which goes to corroborate or to sustain this theory, is admissible. The prisoner not only had the right to give his own version of it, to the jury, but he should have been permitted to introduce any other evidence which would tend in any degree to strengthen or corroborate his testimony in this regard. Having this right, and relating these facts to the jury himself, it became a question for the consideration of the jury, and it may be very material that his evidence should have corroboration. Therefore, if

he could show that the deceased, shortly before the killing, stated that he intended to do the very thing which Trail charges that he did do, and on account of which he says he was provoked and angered until, in the difficulty which followed, the life of the deceased was taken, he certainly should have had the right to do so. Trail says that the deceased did it, and if this evidence had been permitted to go to the jury, they would have had before them evidence that the deceased said he intended so to do, and that evidence, taken in connection with the evidence of Trail, that he did do it, would be strongly corroborative of the evidence of the defendant. There can be no question but what if the deceased had been charged with an assault upon the daughter, that this evidence would have been admissible. If so, I fail to see why it is not admissible in favor of the father upon the charge of slaying the assailant of his daughter. For these reasons, I think the evidence should have been admitted.

CHARLESTON

STATE v. DORR AND MCELWAIN.

Submitted February 7, 1906. Decided March 6, 1906.

1. BAIL—*Forfeiture.*

   A recognizance given in a criminal proceeding, conditioned for the appearance of the accused before a circuit court on the first day of a certain term thereof, and that he will not depart thence without leave of court, can only be forfeited by calling the accused upon the recognizance at some time during the term, and if he fails to appear, by entering his default of record. (p. 193.)

2. SAME.

   If the term at which the accused is recognized to appear adjourns without his default having been entered of record, the recognizance cannot therafter be forfeited, and the recognizors will be discharged from liability thereunder. (p. 193.)

3. SAME—*Scire Facias.*

   In a proceeding by *scire facias* upon a recognizance given in a criminal proceeding, oyer of the recognizance and of the record upon which it is founded, may be demanded. (p. 190.)

Error to Circuit Court, Webster County.

Action by the State against C. P. Dorr and P. M. McElwain. Judgment for defendants, and plaintiff brings error.

Affirmed.

C. W. MAY, Attorney-General, for the State.

HALL BROS., for defendants in error.

SANDERS, JUDGE:

William Kesler, being charged with a felony, had his preliminary hearing before Vincent Hamrick, a justice of Webster county, on the 23rd day of August, 1904, which resulted in the prisoner being committed to jail to await the action of the grand jury. On the first day of September next thereafter, a recognizance in the penalty of $500 was executed by Kesler, with the defendants, C. P. Dorr and P. M. McElwain, as his sureties, conditioned for the appearance of the prisoner before the judge of the circuit court of said county on the first day of the next term thereafter, and not to depart without leave of court, and to answer the action of the grand jury upon such charge. At the term of court at which the prisoner was recognized to appear, which was on the 11th day of November, 1904, an indictment was found and returned against Kesler upon the charge for which he was examined and committed by the justice. At the next term of court therefter, which was on the 11th day of January, 1905, Kesler was called upon his recognizance, and he not appearing, his default was entered, and a *scire facias* awarded against the defendants, C. P. Dorr and P. M. McElwain, his sureties, requiring them to appear before the court on the first day of the next term, to show cause why judgment should not be entered against them upon the recognizance. The *scire facias* being issued and returned, the defendants appeared and craved oyer of the recognizance and record, which it was claimed showed the forfeiture thereof, and of the indictment, and record showing its findings, and thereupon demurred to the *scire facias*, which demurrer was sustained, and the action dismissed, to which judgment the State applied for and obtained a writ of error.

There are several reasons advanced by the defendant in error to support the action of the court in sustaining the de-

demurrer and dismissing the action, one of which is that the bond was given for the appearance of Kesler at the next term of the circuit court thereafter, which was held in November, 1904, and at that term he was not called upon his recognizance, and his default entered of record, and not having been so called, the fact that he was called at the succeeding term, held in January, 1905, and his default entered, could not operate to forfeit the recognizance. In disposing of this question, it will be necessary to know what the circuit court, in passing upon the demurrer, should have considered, as it does not appear from the *scire facias* when the default of Kesler was entered, and the writ awarded. While it is not assigned as error in the petition, yet in the argument, upon behalf of the plaintiff in error, it is insisted that the defendants in error could not claim oyer of the record showing the forfeiture of the recognizance, and the indictment and the record showing its finding, but that in determining the sufficiency of the *scire facias* upon demurrer, the writ itself, together, with the recognizance, after oyer claimed, could only be looked to. Chitty's Pleading, 441, says: "Oyer is not demandable of a record; nor of a recognizance." And in Andrews Stephens' Pleading, 160, it is also said: "Oyer was formerly demandable, not only of deeds, but of records alleged in pleading, and of the original writ also; but by the present practice it is not now granted either of a record or an original writ." And 2 Saunders' Pl. & Ev., 839, says: "Oyer is not demandable of a writ; nor of a record."

But whatever question there may be elsewhere as to this mode of procedure, it seems to be the law, in this State and in Virginia, that oyer is demandable of a record and recognizance. In *State* v. *McCown*, 24 W. Va. 620, oyer was claimed of the record upon which the *scire facias* was founded, which was granted, and the demurrer overruled. JUDGE GREEN, in delivering the opinion of the Court, said: "The record on which the *scire facias* was awarded, is a part thereof, as oyer was claimed by the defendant." And in *Wood* v. *Commonwealth*, 4 Rand. 329, it is said: "A party may plead *nul tiel record*, and if upon inspection by the Court, the record is not such as is described in the pleadings, he will have judgment; or he may claim oyer of the record,

which makes the record a part of the pleadings in that case; 18 Vin. Abr., 184, pl. 20–21, and when it is spread upon the record by oyer, if the party admits that the record of which oyer is given him is the true record, and relies that it does not support the pleadings or *scire facias*, it seems to me that he should not deny that there is such a record, by plea; but, that he ought to demur, upon the ground that it varies from the pleadings or *scire facias*." And, also, in the case of *Hutsonpiller's Admr* v. *Stover's Admr.*, 12 Grat. 579, a *scire facias* was brought to revive a judgment, and defendant pleaded payment, and, objection was made by the defendant that the court improperly permitted the judgment sought to be revived to go in evidence, because it appeared that the judgment was against Hutsonpiller alone, while the *scire facias* set out a judgment against him and Paulser Huber, jointly, and the court, by Lee, Judge, after saying that it was difficult to determine whether the office judgment was set aside as to both defendants or Hutsonpiller alone, says: "But the question of variance does not in fact arise in this case. To raise it, the party should have pleaded *nul tiel record*, which would have put the plaintiff in the *scire facias* to the production of a record such as was alleged; or he should have craved oyer of the record, and demurred." Citing *Wood* v. *Commonwealth*, *supra*. *Commonwealth* v. *Fulks*, 94 Va. 586, is where a recognizance was taken by the circuit court, which was subsequently declared forfeited and a *scire facias* awarded thereon, and upon its return the recognizors appeared and craved oyer of the recognizance, and demurred to the *scire facias*. A recognizance taken either by a justice or by the circuit court, is a matter of record, and we think, under the authorities cited, oyer is demandable of it.

We have, throughout this opinion, referred to the writing in question as a recognizance, but while we have so referred to it, it is because it has been proceeded upon by *scire facias*. It is not in the common law form of a recognizance, but is a bond with conditions, signed by the parties and approved by the justice of the peace. It does not even appear that the parties signed in the presence of the justice, or acknowledged it before him. A recognizance is where the prisoner and his recognizors appear before the court or justice and acknowl-

edge themselves to be indebted to the State in a certain sum, upon a certain condition, which is entered upon the record, and thereby becomes a part of it. While the writing may not be in the form of a recognizance, yet, under our statute, if it possesses the essentials of a recognizance, it cannot be quashed simply for informality. Code, chapter 156, section 20: "No recognizance shall be quashed, or in any manner affected or impaired by reason of any informality therein, if it sufficiently appear therefrom what was intended thereby." And then it is provided in section 10, chapter 162, of the Code, that no action or judgment or recognizance shall be defeated or arrested by reason of any defect therein, if it appear to have been taken by the court or officer authorized to take it, and be substantially sufficient. But while these sections thus provide, yet it must be remembered that they speak of a recognizance, and it would seem that it should, at least, have the essentials to constitute it such. A recognizance certainly, whether it assumes the form of a bond, or the usual form of a recognizance, should be acknowledged before the court or officer taking it. "A recognizance is an obligation of record, entered into before some court or magistrate duly authorized to take it, with condition to do some particular act. In criminal cases the usual condition is for the accused to appear and stand trial. A bail bond is an obligation under seal given by the accused with one or more sureties, and made payable to the proper officer, with condition to be void upon performance by the accused of such acts as he may legally be required to perform. A recognizance differs from a bail bond merely in the nature of the obligation created. The former is an acknowledgment of record of an existing debt; the latter, which is attested by the signature and seal of the obligor, creates a new obligation." 3 Am. & Eng. Ency. Law, 686–687. But the question as to whether or not the bond sought to be recovered upon here should be treated as a recognizance upon which a *scire facias* could be awarded, is not raised by counsel, and we deem it unnecessary to decide this question, because, even putting it upon the ground that it is a recognizance, under our statute, regardless of its informality, still the action of the circuit court in sustaining the demurrer will have to be upheld for another reason.

Code, chapter 156, section 16, provides that where a justice

considers that there is sufficient cause for charging one with an offense, that the commitment shall be for trial, and the recognizance be for the appearance in the circuit court on some day of the term then being held, or on the first day of the next term thereof, and under section 3 of chapter 162 of the Code, it is provided that the bond shall be conditioned for the appearance of the accused before the court, judge or justice before whom the proceeding on such charge will be, at such time as may be prescribed by the court or officer taking it, to answer for the offense with which such person is charged, and shall not depart thence without leave of the court, judge or justice. The recognizance in this case is conditioned: "Now if the said William Kesler shall appear before the judge of the circuit court of Webster county on the first day of the next term thereof, and not depart thence without leave of the court, and shall answer the said action of the grand jury, then this obligation be void, else of force." It is claimed by the defendant in error that the recognizance required the appearance of Kesler at the November, 1904, term of the circuit court, and it became the duty of the court at that term to call the prisoner upon his recognizance, and if he failed to appear, to enter his default upon the record, and declare the recognizance forfeited, and unless this was done, it operated to discharge the recognizors. It appears, as we have observed, that at the November term, 1904, no order was entered showing that Kesler was called upon his recognizance, and that he failing to appear, his default entered of record and his recognizance declared forfeited, but that at the succeeding term, January, 1905, he was called upon his recognizance, and failing to appear, it was declared forfeited, and a *scire facias* awarded thereon. In determining this question, it will be necessary to consider that part of section 7, chapter 162, Code, which says: "When a person, under recognizance in a criminal case, either as a party or witness, fails to perform the condition thereof, if it be to appear before a court, his default shall be recorded therein." In *State* v. *Lambert*, 44 W. Va. 308, it was held to be necessary to call the accused upon his recognizance, and to enter his default of record, in order to charge the recognizors, and that the record is the only evidence as to whether or not this has been done. But the question as to when the accused should be

called upon his recognizance and his default entered of record, has not been decided in this State, but, from the very terms of the recognizance, it would seem that this should be done at the term of court at which he is recognized to appear. In this case, the undertaking of the recognizors was that the accused should appear on the first day of the next term of court thereafter, and not depart thence without leave. Did he appear, and did he depart without leave? There is nothing upon the record which answers this question. If he did not appear, and his case was not disposed of he should have been required to enter into a new recognizance. Who knows but what the party was present in court every day of the term to answer to any indictment returned against him. He was not called to answer, and the court adjourned without his having been called. Now, can it be said that this provision of the recognizance, which says he shall not depart thence without leave of court, means that the recognizors stipulate that they should be bound not only that he would appear on the first day of the term, and during the remainder of that term, but that they should be bound for his appearance from term to term to respond to the indictment, until it was finally disposed of. This certainly cannot be the meaning of this provision, because the condition is that the accused shall appear on the first day and not depart thence without leave of court, that is, not depart the court at that term without leave. And when the court adjourned, without the prisoner having been called upon his recognizance, it would seem that he was given leave to depart. In *State* v. *Mackey*, 55 Mo. 51, it was held that where, pursuant to the terms of a recognizance, a prisoner presented himself at the term of court therein named, and remained in court during the term, ready to obey its order, and no measures were taken to commit him, or otherwise secure his appearance at any subsequent term, on adjournment the bond would be discharged, and could not be forfeited by the failure of the prisoner to present himself at a subsequent term. It may be said that in the case at bar, the prisoner did not present himself. There is nothing to show that he did; neither is there anything to show that he did not do so. We may presume that he did, inasmuch as he was not declared to be in default. An indictment was returned against him at that

term, but he was not called to answer it. This was the time that the defendants in error obligated themselves that he should appear and answer. They did not agree to be bound for his appearance at a subsequent term. The state is the moving party. It is the duty of the state to call for the prisoner to answer the charge if any should be preferred against him. The prisoner has a bond to appear there at that time, and he is supposed to be there, and when his presence is desired, he should be called upon to appear, and if not called and his default entered at that term, his bond cannot be forfeited at a subsequent term. See, also, *State* v. *Moore*, 57 Mo. App. 662. "If a recognizor fail to appear at the term to which he is recognized, and forfeit is not then taken, it cannot be taken at a subsequent term. The recognizance, in such case, is inoperative, and the bail discharged." The recognizance, in this case, was conditioned for the appearance of the accused on the first day of the next term of the circuit court of his county, to answer the state of an indictment for forgery, and abide the order of the court, and not to depart therefrom without leave thereof. This recognizance is equally as broad in its terms as the one we are considering, and there the court held that default must be entered at the term to which the defendant was recognized to appear. To the same effect, see *McGuire* v. *State*, 124 Ind. 536. And, also, in the case of *Swank* v. *State*, 3 Ohio St. Rep. 429, it is held: "A recognizance in a criminal case conditioned 'that the prisoner appear at the next term and thereafter, from day to day, and abide the judgment of the court, and not depart the court without leave,' binds the surety for the appearance of the prisoner during the first term of the court only, and if the court adjourns without making any order, the sureties are exonerated from their recognizance," and, speaking in this case, the court said: "Before the expiration of the term, it is the duty of the state to have the prisoner called, require a new recognizance for his appearance at the next term thereafter, and on failure of the prisoner to enter into the new recognizance, he should be committed to jail." In the case of *Keefhaver* v. *Commonwealth*, 2 Pa. Rep. 241, Chief Justice Gibson says: "Recognizances, being for the appearance at the next, and not at any succeeding term, are to be discharged at the end of the

term by committing the prisoners, delivering them on bail, or setting them at large. But to avoid the trouble of renewing the security, it is sometimes the practice, when the bail consent, to forfeit the recognizance and respite it until the next term; and this answers the purpose perfectly well." In the case of *People* v. *Derby*, 1 Parker's Crim. Rep. 392, it was held: "A recognizance, conditioned for the appearance of M. at the next court of sessions, to be held in the court house at the city of H., to be tried by a jury on two indictments for forgery, is to be construed as requiring the appearance of M. at the next court of sessions to be held in the city of H. and not at the next court of sessions to be held at which a jury shall be summoned. And where such a recognizance was taken in January, 1851, and, at a court of sessions, held in June following, M. was defaulted and his recognizance declared forfeited and ordered to be prosecuted, and in an action on the recognizance, it appeared that a regular term of the court of sessions had been held at that place in March of the same year, though no jury had been summoned to attend at such March term, it was held, that no breach of the condition of the recognizance had been shown, and judgment was given for the defendant." In *People* v. *Hainer*, 1 Denio, (N. Y.) 454, it is said: "Where, in a declaration on a recognizance entered into by a party and his sureties for the appearance of the former at the next general sessions, to answer, &c., and to obey the order of the court and not depart without leave, &c., the plaintiffs averred that at the then next term of the sessions, the recognizance was *respited* and *continued* until and to a succeeding term, and assigned for a breach, that at *such succeeding term* the defendant made default in appearing; *held*, that no sufficient breach of the condition was shown, and that the declaration was insufficient."

In *Goodwin* v. *The Governor*, 1 Stew. & P., (Ala.) 465, it is held that where a party has been recognized to appear at a particular term to answer for a breach of the peace, and the state takes no steps towards a forfeiture of the recognizance (no indictment or presentment being preferred or continuance had) such failure operates as a discontinuance, and discharges the accused. And, also, in *State* v. *Murdock*, 59 Neb. 521, it is held: "A recognizance in a bastardy proceed-

ing, conditioned that the accused 'shall be and appear before the district court on the first day of the next term thereof, and appear thereat from day to day to abide the order of the court' is limited to the term at which it exacts the appearance. A continuance of the cause to a subsequent term of court is not within the contract of the recognizance, and, if made, a non-appearance of accused at the term to which the continuance carries the cause is not a breach of such recognizance." The Supreme Court of Georgia holds: "Before bail in a criminal case can be made liable, the record must show that the principal was called and did not appear." *Park* v. *State*, 4 Ga. 329.

In view of the conclusion we have reached, it is not necessary to refer to the other grounds assigned in support of the demurrer.

There being no error in the judgment complained of, it is affirmed.

Affirmed.

CHARLESTON

STATE v. DILLARD.

Submitted February 20, 1906. Decided March 6, 1906.

1. HOMICIDE—*Self-Defense—Burden of Proof.*

Upon a trial for murder, where the killing is admitted, and the defendant relies upon self-defense, the burden is upon him to establish such defense to the satisfaction of the jury. (p. 199.)

2. SAME.

Where, upon a trial for murder, the evidence introduced by the state to establish the homicide, tends to show extenuating circumstances, this does not relieve the defendant of the burden of establishing self-defense. if it is relied on, to the satisfaction of the jury; but the circumstances so shown are proper to be considered by the jury in arriving at their verdict. (p. 199.)

3. SAME—*Intoxication as Defense.*

Upon a trial for murder, it is not error to refuse to instruct the jury that if they believe the prisoner, at the time of the killing,

was so intoxicated as to be incapable of deliberation and premeditation, he should not be found guilty of murder in the first degree, where there is evidence tending to show that the defendant had previously designed the killing, and became voluntarily intoxicated for the purpose of committing the offense. The instruction should also present this theory to the jury. (p. 200.)

4. CRIMINAL LAW—*Instructions.*

Where the jury are instructed upon the law relating to a particular subject, it is not error to refuse to give other instructions to the same effect, as the court need not repeat instructions already substantially given. (p. 202.)

5. HOMICIDE—*Appeal—Review.*

It is peculiarly within the province of the jury to weigh the evidence upon the question of self defense, and the verdict of a jury adverse to that defense will not be set aside unless it is manifestly against the weight of the evidence. (p. 204.)

Error to Circuit Court, Mercer County.

Lewis Dillard was convicted of murder and brings error.

Affirmed.

A. M. SUTTON, for plaintiff in error.

C. W. MAY, Attorney-General, for the State.

SANDERS, JUDGE:

This is a writ of error to a judgment of the criminal court of Mercer county, convicting the defendant, and sentencing him to the penitentiary for the term of ten years, for the murder ot Bob Banner.

The prisoner, upon his trial, asked the court to give to the jury eleven instructions, four of which were given, but the court refused to give instructions 5 to 11, which ruling of the court, in refusing said instructions, is assigned as error.

While the refusal of instruction No. 3 is assigned as error in the petition, still counsel for the defendant, in his brief, does not advance any reason in support of this assignment; in fact, it is not insisted that it was error to reject this instruction, and, inasmuch as it appears to have been properly refused, it will not be further referred to.

As instructions 6 and 8 present practically the same question, they will be dealt with collectively. The defendant admits the killing, and relies upon self defense to excuse him,

and these instructions present the theory that if there is a reasonable doubt as to whether or not the killing was done in self defense, the jury should acquit. It has always been the law in this State, which has been reiterated time and time again, that where a homicide is proven and the prisoner relies upon self defense, the burden is upon him to establish such defense by a preponderance of the evidence. There is no principle of criminal law better settled and more firmly intrenched than this, and to have given these instructions would have been a violation of this fundamental rule. But, in justice to counsel for the defendant, it is proper to say that in his brief he admits the stability of this doctrine, but claims that it is inapplicable here; that it only applies where the homicide has been proven, and where nothing else appears from the evidence of the State, and that it has no application where the State, in proving the homicide, presents facts which negative malice, and which go to show that the act was justifiable. We fail to appreciate the distinction undertaken to be drawn. The fact that the State, in proving the homicide, shows facts from which it may be concluded that there is no malice, or that the killing was justifiable, cannot alter the rule that where self defense is relied upon, it must be established by a preponderance of the evidence. But these facts introduced by the State in proving the *corpus delicti*, and which at the same time show, or tend to show, want of malice, or that the killing was in self defense, are to be considered in determining whether or not the evidence does preponderate in favor of self defense. When the homicide is shown or admitted, it is then for the jury to determine from all the facts, whether or not self-defense has been shown, and it is immaterial whether the evidence relied upon to show such defense is disclosed by the witnesses for the State or those for the defendant; for the jury, at last, must say, from all the evidence, whether or not such defense has been established by a preponderance of the testimony. *State* v. *Cottrill*, 52 W. Va. 363; *State* v. *Johnson*, 49 W. Va. 684; *State* v. *Hatfield*, 48 W. Va. 561; *State* v. *Staley*, 45 W. Va. 792; *State* v. *Jones*, 20 W. Va. 764.

Instruction No. 7 tells the jury that the evidence that the defendant was reputed to be a peaceable and quiet citizen

is not to be lightly disregarded by them, and that the production of such evidence will be sufficient upon which to base a reasonable doubt as to the guilt of the accused. One fault we find in this instruction is that it invades the province of the jury by telling them the weight which should be given to the evidence. They are told that the evidence is not to be lightly disregarded. As to how the evidence should be regarded, and what weight it should have, should be left entirely with the jury, to be by them taken and considered in connection with all other facts and circumstances of the case. Then it assumes that the good character of the defendant has been shown, and states that the mere fact one accused of crime produces evidence of good character may be sufficient evidence on which to base a reasonable doubt as to his guilt. A court should not invade the province of the jury by telling them what weight should be given to the evidence. It is the duty of the jury to consider such evidence in connection with all the other evidence and circumstances of the case, and to give it just such bearing and weight as it should have. It is peculiarly within their province to determine its true weight and credibility. To have given this instruction would have been tantamount to telling the jury that the defendant had shown good character, and, therefore, it of itself is sufficient to create a reasonable doubt as to his guilt.

It is undertaken to be presented by instructions Nos. 9 and 10 that if the defendant, at the time of the killing, was in such condition from intoxication as to render him incapable of deliberation and premeditation, that he should not be found guilty of murder in the first degree. When there is evidence tending to show that one who is charged with murder was so intoxicated at the time of the killing as to render him incapable of deliberation and premeditation, he is entitled to an instruction presenting this theory to the jury. It is the law that where one is so intoxicated as to be incapable of deliberation and premeditation, he cannot be guilty of murder in the first degree. But this rule does not apply to one who has formed a wilful, deliberate and premeditated design to take the life of another, and, in pursuance of such design, voluntarily makes himself drunk for that purpose, and while in that condition accomplishes the act which he previously designed.

State v. *Robinson*, 20 W. Va. 713; *State* v. *Welch*, 36 W. Va. 690; *State* v. *Davis*, 52 W. Va. 224. The evidence of the State shows that just before the killing, the defendant had been drinking, and that just after the killing, he was very much intoxicated. He denies that he was intoxicated at all, and in his testimony does not rely upon the fact that he was incapable of deliberation or premeditation, but seeks to justify the act upon ground of self defense. This is a binding instruction. By it, the jury are told that if they believe from the evidence that the defendant, at the time of the killing, was so intoxicated as to render him incapable of deliberation and premeditation, that they should not find him guilty of murder in the first degree. This proposition would be correctly presented if there were no facts or circumstances showing that the defendant had previously designed to take the life of the deceased, and had voluntarily become drunk for that purpose, but where there is any evidence to show that he became intoxicated for this specific purpose, after having previously designed the killing, then such an instruction would not be proper without presenting this theory, also. In other words, this instruction practically says that under any and all circumstances, where one charged with murder is shown to have been, at the time of the killing, so intoxicated as to destroy his capacity for deliberation and premeditation, that a first degree verdict cannot be found, while it is only true if these facts, only, exist, and it does not appear that the defendant became drunk, voluntarily, for the purpose of committing the act. Then, is there any evidence which would call for this additional theory to be presented by this instruction? The facts are that an intense unfriendly feeling had, for some time, existed between the defendant and the deceased. That it was so bitter that each had frequently threatened to take the life of the other, and that on the day of the killing, the defendant, in company with another, went to the town of Pocahontas and procured whiskey, and, on his return, went to the home of the deceased and took his life. These facts are sufficient to call for the embodiment, in this instruction, of this additional provision. And, moreover, the refusal of this instruction, assuming that the defendant was entitled to it, is certainly not prejudicial error, because the verdict is for murder in the second degree, and the only pur-

pose of the instruction is to reduce the grade of the offense from murder in the first to murder in the second degree.

By instruction No. 11 it is attempted to define extenuating circumstances. This instruction tells the jury that extenuating circumstances, in order to reduce the degree of criminal guilt, as contemplated in law, are such circumstances as would lead a reasonable man, in self defense, to repel an attack by an enemy, or of entering into a combat under hot blood and provocation. This instruction was properly rejected. In the first place, it is clearly misleading, and, in the second place, it was completely covered by instruction No. 4, given for the defendant. The court, in that instruction, told the jury that if the defendant was attacked by another in such manner as to place him in danger of his life or great bodily harm, and that he believed, and had good reason to believe that he was in danger of death or great bodily harm by reason of such attack, that he had a right, under the law, in repelling such attack, to use such force as was necessary, even to the taking of life.

The defendant also assigns as error that the court gave five instructions for the State, but in argument there is no objection pointed out to instructions 1 and 2, which, we think, were clearly proper, and the objection to 4 and 5 is that the burden of proof never shifted to the defendant, and that the presumption of malice was negatived by the State's own evidence, or, at least, that it left the question of maliciousness and criminal intent uncertain. What was said in reference to instructions 6 and 8, offered by the defendant, and refused, is a sufficient answer to the objection pointed out to these instructions.

Instruction No. 3 is complained of, because it is merely an abstract definition of a reasonable doubt, and is not limited to the case. This instruction tells the jury that a reasonable doubt is not a mere vague or fanciful doubt, but that it is one for which a reason can be given, and that if they doubt as men, they should doubt as jurors, and that if they do not doubt as men, they should not doubt as jurors. This instruction is not subject to the criticism advanced. It seems to present to the jury a proper definition of a reasonable doubt. This the State was entitled to ask, and the jury to have, at the hands of the court. An instruction of practically

the same import was held good in *State* v. *Kellison*, 56 W. Va. 697.

Complaint is made that the court, over the objection of the defendant, permitted the witness, J. H. Mitchell, to testify that the deceased, on the morning of the day he was killed, told him that he had been injured in the mines, and would go home and not return to work that day. This evidence was not material, but, at the same time, it could not have in the slightest affected the finding of the jury. And, then, again, the fact that he was injured that morning, and was not working that afternoon, on account of the injury, was proved by Mary Coleman, a witness for the State, and the fact that Banner said he was hurt and would not work was simply a reiteration of that fact, and that he was hurt is not controverted or attempted to be discounted.

It is claimed that the court should have allowed Dr. J. P. McNutt to testify as to the seriousness of the wound given by the officer, Huff, to the defendant when he was arrested, to show the feeling or prejudice of the officer, who was introduced as a witness. We cannot see how the seriousness of the wound would tend to show the feeling of the witness toward the defendant. The fact that the officer shot him twice, is in evidence. If the purpose of this testimony is to show that Huff entertained a hostile feeling toward the defendant, and if it could be used for this purpose, the fact of the shooting would be that which would demonstrate it, and not the seriousness of the wound. This evidence was properly rejected. And, even though this evidence was admissible on the ground that the defendant had the right to show it for the purpose of establishing the fact that the officer entertained an ill feeling toward him, yet its rejection could not be prejudicial to him, because the evidence of the officer has no bearing on the case. He only states that he was summoned to assist in arresting the defendant; that he went to Simmons; found the defendant in some weeds, and that he was lying down on his right side, with his feet toward the officer, and with his pistol pointed toward him. This evidence could, in no possible way, have any bearing upon the question at issue.

As the case now stands, we have only to inquire whether

the verdict is supported by the evidence, as the refusal of the trial court to set it aside is assigned as error. This was peculiarly a jury question, they being the triers of the facts and invested with the power to weigh the evidence, and test the credibility of witnesses. *State* v. *Newman*, 49 W. Va. 724. They have the right to believe or disbelieve witnesses, and, possessing this power, and having found a verdict against the defendant, which was approved by the trial court, it will not be disturbed, unless it be very plain that it is erroneous. The killing is admitted, and the defendant relies upon self defense to excuse him. He presented this theory of his case to the jury, which was discredited by them, after having heard all the evidence, and having seen the witnesses. They listened to the defendant's version of the affair, and having found against him, this Court cannot, under the well settled legal rules, disturb their finding. We not only conclude that the verdict cannot be set aside, because of a lack of sufficient evidence to support it, but are constrained to view it as eminently just; and the judgment of the criminal court is, therefore, affirmed.

Affirmed.

CHARLESTON

SMITH *v.* SOUTH PENN OIL CO.

Submitted January 23, 1906. Decided March 6, 1906.

1. MINES AND MINERALS—*Oil Lease—Construction.*

   The following clause in a lease for oil and gas purposes imposes no obligation to pay rent: "Provided, however, that this lease shall become null and void and all rights hereunder shall cease and determine unless a well shall be completed on the said premises within three (3) months from the date hereof, or unless the lessee shall pay at the rate of sixty-five and 25-100 (65 25-100) dollars, quarterly, in advance, for each additional three months such completion is delayed from the time above mentioned for the completion of such well until a well is completed." (p. 206.)

2. SAME—*Liabilities of Lessee.*

If, after having drilled one unproductive well under such a lease. and paid commutation money until the completion thereof, the lessee is permitted to drill another, without making further payments, and without notice that any compensation will be demanded or required of him for such further use and occupation of his premises, none can be recovered. (p. 209.)

3. SAME—*Conduct of Parties.*

Such a contract being ambiguous as to what shall constitute a completed well, the conduct of the parties, in treating the completion of an unproductive well as an act sufficient to vest in the lessee a right to make further exploration without additional payments, is conclusive upon them, under the principle of practical construction. (p. 208.)

Error to County Court, Tyler County.

Action by Albert H. Smith against the South Penn Oil Co. Judgment for plaintiff, and defendant brings error. Judgment reversed, and judgment for defendant rendered.

A. B. FLEMING, R. F. FLEMING, C. POWELL, and THOS. P. JACOBS, for plaintiff in error.

J. V. BLAIR, J. H. STRICKLING, and M. K. DUTY, for defendant in error.

POFFENBARGER, JUDGE:

Judgment for $217.50, with interest and costs, was rendered by the circuit court of Tyler county, on a demurrer to evidence, against the South Penn Oil Company, in favor of Albert H. Smith, in an action of *assumpsit*, for compensation for the use and occupation of real estate, and said South Penn Oil Company seeks a reversal of said judgment.

Possession of the land was taken and held under a lease executed to defendant for oil and gas purposes, containing no express covenant, binding the lessee either to drill a well or pay rent. The only covenants are to deliver in the pipe lines, to the credit of the lessors, their heirs and assigns, one-eighth of the oil produced and saved from the premises; to pay $200.00 per year for the gas from each gas well on the premises, the product of which is marketed and used off of the premises; to locate all wells so as to interfere as little as possible with the cultivated portions of the farm; and to pay all damages to growing crops by reason of operations. Then follows this clause:

"Provided, however, that this lease shall become null and void and all rights hereunder shall cease and determine unless a well shall be completed on the said premises within three (3) months from the date hereof, or unless the lessee shall pay at the rate of sixty-five and 25-100 (65 25-100) dollars, quarterly, in advance, for each additional three months such completion is delayed from the time above mentioned for the completion of such well until a well is completed. Such payments may be made direct to the lessors or deposited to their credit in McKim Post Office, Tyler county, W. Va."

The lease bears date January 18, 1896. Seven payments of $65.25 each, for delay in drilling, were made, and a well was completed in December, 1897. The lessee then abandoned the premises until the spring of 1899, when it re-entered thereon and completed another well in May of that year. Both wells were unproductive and the tools, machinery and appliances were finally removed from the premises in January or February, 1900. This action was brought for rent for the whole period from January 18, 1898, until January 18, 1900, at the rate of $65.25 per quarter.

Barring the fact of actual occupancy and use of the leased premises, this case is governed by the principles announced in *Snodgrass* v. *South Penn Oil Co.*, 47 W. Va. 509, following the case of *Glasgow* v. *Gas Co.*, 152 Pa. Sta. 48. The lease contains, not a covenant to pay rent, but only a clause, giving to the lessee the option or privilege of paying a specific sum every three months in advance, as a means of keeping the lease alive and operative. It was not bound to do so and could, without the violation of any terms in the lease, allow its rights to be forfeited and to cease and determine by failure to drill a well or pay said sum. It merely gave the privilege of extending the lease by periodical payments of the amount specified.

The declaration, however, is not predicated upon any covenant in the lease. The demand is for the use and occupation of the land "by the said defendant at its special instance and request, and by the sufferance and permission of the said plaintiff for a long space of time before, then elapsed, had, held, used, occupied, possessed and enjoyed." But there is no evidence of any occupancy otherwise than under the lease and for the purposes therein expressed, and that instrument

imposes no obligation. It simply permitted occupation and use for the purpose of exploring for oil and gas. The lessors may have had it in their power to prevent the second entry upon the property, but if so, they waived that right and took the benefit of the large expenditures incident to the drilling of the second well. It was not an occupation and use for the sole benefit of the lessee, but for the mutual benefit of both parties. As one unsuccessful exploration had been made, and the lessee was permitted, without objection, to drill another well, under a contract indefinite and uncertain as to the rights of the parties after the drilling of such a well, what should be deemed a completed well being undefined by the lease, this conduct on the part of both lessors and lessee amounted to a practical construction thereof. The lessee claimed the right to go on and put down another well without making additional payments for continuance of the lease until completion thereof, and the lessors, by their silence and acquiescence, assented and agreed to this interpretation of the contract, and, having done so, cannot now set up a claim for rent. The testimony of the plaintiff makes this theory plain. He said: "I had a chance to lease my land, but when the people wanting it would learn the situation they said they didn't want it while the South Penn Company have a lease on it, but said if I could get it released they would take my land. Then I spoke to M. K. Duty and asked him to speak to them and see if they would not give it up, and he wrote to them and they answered back." But what they said is not stated. The witness did not produce the letter nor prove its contents and he further testified that he did not enter into a written lease or further agreement with the lessee, concerning the drilling of the second well. The applications of this rule are many and varied. (See Page Con., section 1126.) It cannot avail against the plain terms of a deed or other contract and the conduct of a party, relied upon as expressive of his understanding of the contract, must be positive and unequivocal, and it must appear that he was cognizant of the actual intention of the other party. *Id.* But all these circumstances are combined here. Smith, suspecting a claim by the lessee of right to make further exploration without paying additional amounts, addressed an inquiry to it to verify his suspicion. In response thereto the second well

was soon afterwards put down, without any objection or demand for payment of rent. It is plain, therefore, that, in the opinion of both parties, the lessee, by drilling the first well, though unproductive, acquired the right to make further exploration without payment of additional commutation money. The decisions of this Court afford a number of illustrations of the application of this principle. *Heatherly* v. *Bank*, 31 W. Va. 70; *Scraggs* v. *Hill*, 37 W. Va. 460; *Crislip* v. *Cain*, 19 W. Va. 438, 441; *Hurst* v. *Hurst*, 7 W. Va. 299; *Caperton's Admr.* v. *Caperton's Heirs*, 36 W. Va. 479; *Chapman* v. *Coal Co.*, 54 W. Va. 193. That the deed is ambiguous as to what is sufficient to vest a right of exploration, without payment of money, admits of no doubt. It declares that it shall remain in force for the term of ten ten years, and then provides that it shall cease and determine "unless a well shall be completed" on the premises within three months, or unless the lessee shall pay a certain amount of money every three months "until a well is completed." What kind of a well? Some are productive and some are unproductive, and it costs a considerable amount of money to put down either kind. The question is, not what, in point of fact or law, constitutes a well, but what is a well within the meaning of the deed? No court or jury is able to answer it as well as the parties themselves, and they have responded by their conduct. It is not intended here to intimate that the drilling of an unproductive well vested any right in the lessee other than that of exploration as aforesaid, or absolved it from any further duty in the premises in case it desired to hold the property for the full term specified. Principles relating to this subject are discussed fully in *Bridgewater Gas Co.* v. *Parish Fork Oil Co.*, 51 W. Va. 583; *Steelsmith* v. *Gartlan*, 45 W. Va. 27; *Urpman* v. *Lowther Oil Co.*, 53 W. Va. 501.

In view of the foregoing principles and conclusions, the error of the court, in overruling the defendant's demurrer to the evidence, is manifest. The judgment will, therefore, be reversed, the demurrer to the evidence sustained and judgment rendered for the plaintiff in error, with its costs in the court below as well as in this Court.

Judgment reversed and judgment for defendant.

CHARLESTON

BURKHEIMER *v.* NATIONAL MUTUAL B. & L. ASSOCIATION.

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Submitted January 31, 1906. Decided March 6, 1906.

1. BUILDING AND LOAN ASSOCIATIONS—*Dues---Maturing Stock---Dissolution of Contract.*

   Suspension, by a building and loan association, of the payment of dues on its stock by its members, for an unreasonable time, so as to work a material departure from its general plan and scheme of satisfying loans, made to its members, of the ultimate value of their shares of stock, by maturing the stock, affords ground for dissolution of the contractual relations existing between it and a member to whom such loan has been made. (p. 213.)

2. BUILDING AND LOAN ASSOCIATIONS---*Dissolution of Contract---Amendment to By-Laws.*

   A borrower is not estopped from demanding such dissolution, under such circumstances, by his having voted for an amendment to the by-laws of the association, conferring upon its directors power to suspend payment of dues. (p. 216.)

3. SAME---*Mismanagement---Withdrawal of Borrowing Member.*

   When, by reason of gross mismanagement of a building and loan association, a member, who has borrowed from it the ultimate value of the stock subscribed by him, has the right to sever his relations with it, and elects to do so, he is to be charged with the amount of the loan and legal interest thereon from the date on which he received the money, and credited with the interest and premium paid, until the date on which his right to withdraw accrued, and the value of his stock as of said date, as nearly as the same can be ascertained, making due deductions for his share of the expenses and losses sustained up to that date; and, on the balance thus found to be due from him, he is to be charged with interest and credited with all payments thereafter made by him, whether on account of dues, interest or premium; and, in applying credits, before, on and after said date, the rule governing partial payments is to be observed and followed. (p. 217.)

4. SAME---*Premiums*

   A building and loan association contract of loan, stipulating for the payment of a monthly premium, limited to a certain number of payments, is not violative of the provisions of section 26 of chapter 54 of the Code of 1899, relating to the premium in such contracts. (p. 211.)

5. FOREIGN BUILDING AND LOAN ASSOCIATIONS---*Right to Transact Business in this State*

   Failure of a foreign building and loan association to comply with

the provisions of section 30 of chapter 54 of the Code of 1899, does not preclude it from transacting business in this State. (p. 211.)

6. BILL IN CHANCERY—*Allegations—Answer.*

An allegation in a bill, which, by reason of its vagueness and uncertainty, fails to show materiality of its subject-matter, need not be answered. (p. 211.)

Appeal from Circuit Court, Cabell County.

Suit by Wm. M. Burkheimer, Jr., against The National Mutual Building and Loan Association of New York *et al.* From a decree fixing the amount owing from the plaintiff to defendant Building and Loan Association, said association appeals.

Reversed.

WYATT & GRAHAM, for appellant.

SIMMS & ENSLOW and L. D. ISBELL, for appellee.

POFFENBARGER, JUDGE:

On a bill in equity, filed by William M. Burkheimer, Jr., against the National Mutual Building and Loan Association, of New York, for a settlement and adjudication of the amount due on the loan made by said association to him, on the basis of a simple, straight loan, by application to the debt of all sums paid as dues, interest and premiums, under the rule of partial payments, on the theory that the contract between the plaintiff and said association never was a legal building and loan association contract, or, if it ever was such, that, by misconduct on the part of the association, or departure from its plan, the contract has ceased to be a building and loan association contract, and for the cancellation of the deed of trust by which payment of the loan is secured, the circuit court of Cabell county adjudged and decreed, in conformity with the prayer of the bill, that there was due said association the sum of $1.50, which amount, with interest thereon from the date of the decree, was decreed in its favor, and it has appealed, claiming a much larger amount.

In *Thompson* v. *National Mutual Building and Loan Association*, 57 W. Va. 551, (50 S. E. 756), the validity of the contracts of the appellee was assailed, because of the provisions of its by-laws and form of contract, respecting payment of the premium, and an effort was made to defeat the enforcement of its contract, under the principles announced by this

Court in *Gray* v. *Baltimore Building and Loan Association*, 48 W. Va. 164, *Floyd* v. *Loan and Investment Co.*, 49 W. Va. 327, and other similar cases. But, on examination of the contract, this Court concluded that, as the premium stipulated for was not payable indefinitely and until maturity of the stock, as in the other contracts, held to be usurious for that reason, but was limited to ninety-six payments, it was sufficiently definite and certain, being a fixed premium payable in instalments, and, therefore, was not violative of the building and loan statute of this State. This ground of invalidity, though set up in the bill, is not relied upon here.

Failure of the appellee to record, in the secretary of state's office, its articles of association and by-laws, as required by section 30 of chapter 54 of the Code, is alleged as ground for holding the contract invalid, on the theory that the appellee has not acquired the right to do business in this State as a building and loan association. In *Thompson* v. *National Mutual Building and Loan Association*, cited, this precise question was raised and it was expressly held, on principles announced in *Toledo Tie & Lumber Co.* v. *Thomas*, 33 W. Va. 566, that such failure did not deprive the corporation of the right to do business in the state as a building and loan association. No reason is perceived why, in respect to this requirement, a building and loan association should be regarded as standing otherwise than as other foreign corporations. It is not the purpose of this statute to discriminate between foreign corporations on the ground of their character or the nature of their business. It has no special application to building and loan associations. It is a general statutory regulation, applicable to all foreign corporations, not denying to them the right to do business in the State, but subjecting them to fines and penalties for non-compliance therewith.

Another ground of attack is failure of the association to comply with the laws of the State of New York. Just what is meant by this allegation is not very clear. It is both general and uncertain. It reads as follows: "The plaintiff now, however, alleges and charges that said Association has not complied with the statutory requirements of the State of New York so as to permit said Association to come within the benefits granted by the statute of the State of New York to Building & Loan Associations, but that it has failed to prop-

erly file and record its articles of Association as provided by the laws of the State of New York, which is a prerequisite before it is permitted to do business as such Building & Loan Association in the State of West Virginia." It is not alleged that there has been a failure to file and record the articles of association, but only that they have not been properly filed and recorded. The bill does not charge that any law of the State of New York requires articles of association to be filed and recorded as a pre-requisite to the right to do business, as a building and loan association in the State of New York, or, to the right of a New York building and loan association to transact business in another state, but only that it is a prerequisite to the right to do business as a building and loan association in the State of West Virginia. No statute of this State, so far as we are able to see, denies to a foreign corporation the right to do business here because of failure to strictly comply with every regulation prescribed by the laws of its own state. But if we had such a statute, this allegation is too indefinite and uncertain. The bill admits the corporate existence of the defendants. It is sued as such, and the only fault found with it is its failure to file and have recorded its articles of association in some office or place not specified or indicated. Where and how are they to be filed? In alleging failure to perform duty, the bill must show what that duty is. "It may be affirmed as an elementary rule of the most extensive influence, that the bill should state the right, title, or claim of the plaintiff with accuracy and clearness; and that it should, in like manner, state the injury, or grievance, of which he complains." Story Eq. Pl., section 241. If it alleged that, by the laws of the State of New York, such articles of association are required to be filed in a particular office, and that they have not been so filed, then the court could look to the laws of that state as evidence, to sustain the allegation, and the defendant would be apprised of what is relied upon as a failure of duty, working fatal infirmity in its organization or contract. Can it be forced by such a general allegation to produce evidence of strict and full compliance with every statutory provision of the laws of New York, relating to corporations? How can it know whether the omitted act is material without an indication as to what it is? Some statutes are mandatory and some direc-

tory. What is the character of the one which is said to have been violated? How can anybody tell? The opposite party is entitled to notice. He is not required to respond to a drag-net allegation. Certainty is one of the essentials of pleading. Story's Eq. Pl., sections 28, 240, 241; *Wellsburg &c. R. R. Co.* v. *Traction Co.*, 48 S. E. 746, 750; *Billingsley* v. *Menear*, 44 W. Va. 651; *Vance Shoe Co.* v. *Haught*, 41 W. Va. 274; *Zell Guano Co.* v. *Heatherly*, 38 W. Va. 409; *Pyles* v. *Furniture Co.*, 30 W. Va. 123; *Newberger* v. *Wells*, 51 W. Va. 624, 639. That quality is wholly wanting in so much of the bill as relates to this matter.

A serious matter is presented, however, by the charge that the building and loan association has practically abandoned its whole plan and scheme, by an indefinite suspension of dues, continued for the long period of nearly seven years, to-wit, from the first day of June, 1898, until the 29th day of April, 1905, when its answer was filed in this cause. The loan was made in 1893, from which date the plaintiff paid dues, interest and premiums until May 31, 1898, but not regularly and promptly. On the 20th day of April, 1898, the by-laws of the association were amended so as to confer upon the directors authority to suspend payment of dues on all shares, at any time, by a two-thirds vote, for such period of time as to them might seem best. Under the authority thus conferred, they did suspend payment of dues on all shares, borrowed and unborrowed, from the first day of June, 1898, and, so far as this record shows, have never resumed the collection thereof. But they required the payment of interest and premium on the loan during the period of suspension and gave to the borrowers the right to make such payments, on account of the principal of their debts, as they might wish to pay, and represented that there should be a consequent reduction in the interest and premium to be collected. Under this arrangement, the plaintiff continued to pay interest and premiums until the 17th day of July, 1900, and also to pay money in lieu of dues until the 9th day of June, 1900, amounting to the sum of $180.00. He having ceased to make further payments, the directors, on the 12th day of June, 1900, ascertained the value of his stock to be $456.44, applied said sum as a credit on the loan of $1,200.00, and claimed a balance due the association on that date of $864.49.

Being of the opinion that, by the suspension of the payment of dues, the association had forfeited its right to enforce the contract as a building and loan association contract, the circuit court treated the whole transaction as an ordinary loan, giving the plaintiff credit on the debt for all sums paid.

As the contract was originally a valid one, it is difficult to see how a breach thereof on the part of the building and loan association, could make it void *ab initio*, or change its character. Up until the first day of June, 1898, the association, for anything that appears in this record, literally and strictly complied with all the terms of the contract. All payments made prior to that date were confessedly made under the contract, and under a valid contract. The effect of a breach of the contract, or failure of duty, by the association, on that date, would be, not to divest rights which had already attached, nor to undo things which had been done in conformity with the contract, but only to vest in the injured party a right of action for damages or specific performance, if he wished to stand upon his contract right, and, if he did not to demand a rescission of the contract, or settlement by way of withdrawal. These are elementary principles of law which the courts cannot disregard, however harsh their operation may be. Relief from a contract cannot be given by the courts merely because it is a hard one or an improvident one, or to punish somebody for wrong-doing. Courts of equity have large powers, it is true, but they are limited to the effectuation of equity and justice, not in disregard of contracts or contractual rights, but upon certain equitable grounds, springing out of the conduct of the parties, or fortuitous circumstances; but in all such instances they are careful not to do injustice, not to ignore vested rights and interests, and never to depart from the letter of a contract, further than is necessary to the effectuation of right and justice, as they spring out of inequitable conduct of some of the parties. Their office is not to execute vengeance or punish the wicked.

In becoming a stockholder in the association and borrower from it, the plaintiff entered into contractual relations, not only with the association as a distinct corporate entity, but with all its other members, and these may have been numerous. There were expenses to be borne, losses to be sustained and

profits anticipated. And those who took stock, paid in their money and borrowed money, put themselves in the same situation as the plaintiff, and have rights and equities as meritorious and sacred as his. He may be one of a thousand men who stand in practically the same situation. To give him back all the money he has paid in by way of credit on the amount borrowed by him would relieve him from the burden of all the expenses of the association and from liability to contribute to its losses, and, if one after another of the stockholders and borrowers should be permitted thus to withdraw, the fund would be exhausted in a short time. Five hundred of the one thousand would come out whole while the remaining five hundred would lose everything. The association mangement may have been corrupt or inefficient and the losses may be heavy by reason thereof. But can a court of equity say that, because this man has been wrongfully treated, his money wasted, and squandered by inefficient or corrupt directors, he shall be permitted to throw the whole loss upon his associates? That is not the basis of settlement adopted by this Court in the case of the insolvency of building and loan associations, in consequence of which a similar state of affairs exists. All are required to contribute proportionately to the loss sustained. In *Young* v. *Building Association*, 48 W. Va. 512, this Court laid down the following rule, applicable to such a situation: "Upon the insolvency of a building association the dues paid on stock by borrowing members are not to be credited on the debts of such members. Upon insolvency of a building association, in winding up its affairs a borrowing member must be charged with his debt and interest, and credited with all moneys paid in by him except dues on stock. After payment of debts, he gets his share of residue, in the final distribution of what remains after payment of expenses of winding up and debts. If it be safe to all interests and practicable to ascertain in the present value of the stock, the court may, for the present relief of a borrowing member, credit that value of his stock on his indebtedness, without deferring its application till the final value."

Whether the plaintiff may sever the relations existing between him and the association, otherwise than in the man-

ner provided by the by-laws, depends upon the nature of his contract and his conduct in reference to the matter of which he complains, namely, the suspension. At the time of the amendment of the by-laws, somebody held his proxy and voted for the amendment. Assuming that the holder of his proxy had authority to vote for an amendment so materially affecting the contract, it does not follow that the plaintiff assented to all the consequences which have resulted from that amendment. The vesting of authority in the directors to suspend the payment of dues and the suspension itself may have been entirely proper and promotive of the best interests of the association and all its stockholders, including the borrowers. That the directors should have such power may be altogether proper and wise. The possession of that power by the directors is the remote, not the immediate and direct, cause of the injury of which complaint is made. The suspension covers a long period of time, and there is no suggestion in the record of any intention or purpose to resume payment of dues. For aught that appears here, it is a permanent suspension, with a view to winding up and dissolving the corporation. It has been held that a temporary suspension affords the borrower no ground of defense against the enforcement of the obligation of his contract. *Johnson* v. *Building Association*, 104 Pa. St. 399; *Thompson* v. *Building Association*, 56 Ga. 350. But this could hardly be deemed a mere temporary suspension. The effect of it is to cause the borrower to pay a large amount of interest not contemplated at the time of entering into the contract. It also denies him the privilege of reducing his debt in the manner contemplated, postpones for years the maturity of the stock and renders it doubtful as to whether it will ever mature. The directors in this instance have not only required the borrower to pay interest on the debt, but the premium in addition thereto. These items amount to $12.00 a month, $72.00 a year, nearly $500.00 for the period of nearly seven years. This is a considerable amount of money to exact on a small transaction like this in a manner not contemplated at the inception of the contract, and there is no suggestion that there will be any cessation of it. The continuance of the business and the execution of the contract substantially, according to its terms, was expected

and relied upon by the plaintiff in entering into it. He supposed that, at the end of the eight years, his stock would mature and thereby satisfy the debt. In this way, he could, by small periodical payments, extending over a considerable period of time, pay what was, to him no doubt, a considerable debt, without greatly burdening himself. Twelve years have passed and, during more than one-half of that period, there has been an abandonment of that part of the contract which it was supposed would largely contribute to the satisfaction of the debt at the end of the contemplated period. This is material and ought to afford ground of relief. 7 Thompson on Corporations, section 8796, says: "In return for the undertakings of the borrower in the transaction of loan or advancement as they have been pointed out, there is an implied undertaking on the part of the association scheme in the liquidation of the whole of his indebtedness; *i. e.*, that it shall be by means of gradual payment, and that he shall participate, and have the opportunity of reducing his liability by his participation, in the profits of a continuing business, to be carried on to a fixed end. Where, through bad management, financial misfortune, loss of membership, or any other cause, the career of the association is brought to a premature close, the borrower is compellable forthwith to pay the balance due from him on his security, although in terms only given for installments. He is, therefore, deprived of some proportion of the advantages, the prospect of which induced him to assume the burden of his original obligation. There remains nothing to compensate him for his liability to make up the premiums, to keep up stock payments, to pay fines, etc. The consideration of the liability failing, the liability itself must, in a proportionate degree, fail also."

As a case of dissolution or inability to carry out the contract is not here fully disclosed, what has just been quoted may not be applicable in its full extent to this case; but it asserts a principle within which the case falls. There has been such a departure from the plan, and such an abandonment of some of its essential features for so long a time, as to deprive the borrower of a substantial part of the original consideration, in consequence of which he is entitled, upon

well settled principles of law, to a severance of his relations with the association on some equitable and just basis. Though there may be no cause for dissolving the corporation and winding up its affairs, there is ample cause for dissolving the relations subsisting between him and the corporation, just as one partner may, for cause, dissolve a co-partnership or withdraw from it, leaving it subsisting as between the other partners, if they desire to carry it on. In such case, it may be that there is a technical dissolution, since the settlement must be made on the same basis as in the case of final dissolution and distribution of all the assets. But in every practical sense, it may be a mere withdrawal by one member of the co-partnership, and no reason is perceived why such withdrawal cannot be effected in a corporation, when the circumstances warrant it. Many of the principles of co-partnership enter into the relations subsisting between the members of a corporation. On dissolution and settlement the same principles apply, except that ordinarily there is no liability for unpaid debts. and the legal title to the assets is not in the members of the corporation as it is in the members of a co-partnership. A dissolution of a partnership, for cause, puts an end to it, but its termination does not imply that it never had any existence. When the cause which gives right to a dissolution arises, it does not vitiate the contract from the beginning. On settlement it is treated as having been a valid binding obligation from the beginning until the date of dissolution.

In the application of general principles, some variation must always be made to accommodate them to the nature of the case and its peculiar circumstances. This is not a co-partnership nor is it an ordinary corporation. The borrowing stockholder sustains a dual relation to the corporation, and, through it, to his corporate associates. In one aspect he is a debtor, the amount due from him constituting part of the assets of the corporation to which its creditors may look for satisfaction of their demands and to which, after the satisfaction of the claims of creditors, payment of expenses and deduction for losses, all the stockholders, he included, may look for their distributive portions on dissolution, or consummation of the enterprise. In another aspect, he is a stockholder, contributing to the capital stock of the corporation,

along with his corporate associates, all in some form sharing the burden of expenses and the risk of losses and dividing the profits earned. But a peculiar feature of the arrangement is that each borrowing member hopes and expects that his stock, with the profits earned, will ultimately pay the debt he owes. Each borrower pays an enormously high rate of interest, but knows that every other borrower is doing the same thing and that their money kept continually loaned at a high rate of interest, collected weekly or monthly and re-loaned and thus compounded, will produce large profits to the association to be apportioned to the stockholders as additions to the stock values, thus accelerating and hastening the maturity of the stock and consequent payment of the debt. The statute allows such collection of interest for the very reason that the borrower profits by the arrangement. It hastens the day of maturity of the stock and comes back to each stockholder in proportion to the amount of his stock. Though not the ordinary legal rate of interest, it is a lawful rate which the law permits the members of building and loan associations to establish among themselves for their mutual benefit.

Upon these considerations, it might be just and fair to give the association the benefit of the premiums paid, or which ought to have been paid up to the date of the suspension, and allow the borrower to take, as a credit on his debt, the full actual value of his stock at that date. But he agreed to pay that premium as a consideration for the opportunity given him to satisfy the loan by maturing the stock within the time contemplated. He did not agree to pay, as premium, fifty cents per share for such length of time as the association might be solvent or properly conduct its business, but for the whole period of eight years, as consideration for the satisfaction by the association of his debt at or near the end of that period by maturing the stock. The premium is not, in a legal sense, additional interest, though it practically amounts to that. Legally, it is the purchase money of the right to take from the association as a loan the ultimate value of the borrower's stock to be paid and satisfied by the maturing of that stock. When the association becomes insolvent, or, by its misconduct, makes it necessary or proper for the borrower to dissolve his relations with it, the consideration for the

agreement to pay that premium fails and the borrower may elect to withhold it, and to claim, as a credit on his debt, such portion of it as has been paid. In some jurisdictions, the premium is apportioned, according to the time which has elapsed, such part of the premium as is proportionate to that time being called the "earned premium" and the residue the "unearned premium." In other jurisdictions, the reasonable view of a total failure of the consideration for the premium is adopted and the borrower is allowed credit for all the premium paid. This Court, in *Young* v. *Building Association*, followed that line of decisions which allows the borrower credit for all the premiums paid. Here, inasmuch as the borrower has shown himself to be entitled to go out of the association, not by way of withdrawal, in the manner prescribed by the by-laws, but as of right, as is the case of a dissolution, the same principle ought to be applied.

Endlich on Building Associations, after reviewing the decisions in the different states, says, at section 531: "Upon the basis of all the decisions examined, it may be safely laid down that the clear weight of authority rejects the enforcement of any part of the premium. And in reason and fairness this must be so. The premium is not a payment in advance. The contract concerning it is that it shall be made up by the borrower in the association's hands, and that, upon his final settlement with the association, when the work of both shall be accomplished and their reciprocal duties fulfilled, it shall be relinquished to and appropriated by the association. The contract, therefore, is an entire one. It does not contemplate a stoppage at any intermediate point and an apportionment of the premium accordingly. No part of it is earned until the whole scheme has been carried out. Hence, if at any stage, the society, breaking down, fails to perform its part of the bargain, the promise to pay it the premium loses the consideration upon which it was based, and ought to be regarded as wholly abrogated. To attempt to apportion the premium is simply to treat it as additional interest. To regard it as something with which the borrower has parted, as something which the society has earned, as assets in its hands before it has done that which entitles it to retain the premium, is to misconceive its true character and office. It must be true, therefore, that the basis of the borrower's in-

debtedness is to be taken to be the amount of money actually passing into his hands with legal interest thereon. But it cannot be true that he is to be allowed as deductions therefrom all that he has paid into the society. That would be overlooking his duty as a member to contribute to the losses and expenses of the common enterprise. What he has paid as interest is to be allowed him as paid upon interest. If he has paid interest upon the premium bid by him, he has overpaid his interest, and the excess ought to go in reduction of his debt. * * * * When a building association's affairs are in the hands of a receiver, acting under the direction and supervision of a court of equity, there can be no difficulty in determining or, at least, approximating what its receipts, profits and losses have been, what its liabilities are, and what is the value of every share of stock presently held advanced or unadvanced in it, and how much every member must lose upon every dollar paid in by him upon his stock, making a proper allowance for the expenses of settlement. If that can be ascertained, the amount per share to be credited upon the borrower's indebtedness, that is, upon the amount actually received by him originally, has been found, and if he pays the balance with interest (being credited with interest payments) he has discharged all he owes the society or his fellow members. If these preliminary calculations can be made to yield only an approximately correct result, a corresponding credit ought to be allowed for the borrower's stock and his right preserved to reclaim what, on a final settlement, he shall appear to have overpaid."

This law seems to be justly and fairly applicable to the present case, but at what time ought the application of it to be made? Since June 1, 1898, nothing appears to have been done but receiving interest and premium on the loans and collecting assets. The plaintiff has not paid nor been permitted to pay, any dues, and it seems to be admitted that none had been paid by any person. He has made payments corresponding in amount to the dues, but with the understanding that these payments were to be credited upon his debt. Hence, it appears that there has been a cessation since June 1, 1898, of some of the most important functions of the association. What disposition has been made of the collections does not appear. Whether they have been re-loaned

and profits made or have been consumed in the payment of withdrawals, nothing in the record indicates. It is fair to presume that, had the association regained its normal and healthy condition, this state of affairs would not exist. It would be exercising all its functions and working towards maturity of the stock. Something must still be radically, and perhaps incurably, wrong. All this argues that such was the condition at the date of the suspension. The logic of the situation and circumstances disclosed by the record is that a process of liquidation has been carried on for all these years by the directors. Hence, the adjustment between the plaintiff and defendant ought to be made as of June 1, 1898. He should be charged with the amount of the loan and interest thereon from the time at which it was received, and all payments made by him, as interest and premium, should be credited and applied on the debt and interest thereon, according to the rule governing partial payments, and the actual value of his stock, as nearly as it can be ascertained, as of June 1, 1898, should be credited also. Then, starting with the balance thus ascertained, he should be charged with interest thereon and credited with all payments of premium, interest and dues, or sums paid in lieu of dues, under the rule governing partial payments, and required to pay the amount remaining due as thus ascertained, and, upon the payment of said amount, the association should be required to execute a release of the deed of trust. How far the result, so to be determined, will differ from that at which the court below arrived, in treating the loan as an ordinary one, depends largely upon the value of the stock. The dues paid up to June 1, 1898, amounted to $388.80, but it seems that several payments were omitted, in consequence of which the value of the stock at that date would probably be considerably less than that of other shares, the dues on which were kept promptly paid. The incompleteness of the record, respecting the status and value of the stock at the time aforesaid, may render it necessary to conduct an inquiry in respect thereto. It may also appear, upon full investigation and disclosure of all the facts, that credit for the full book value of the stock on that date would not be equitable and just. Therefore, the matter of what should be credited, as the value of the stock at the time afore-

said, will be left open for determination by the circuit court upon ascertainment of the necessary facts.

For the reasons above given, the decree complained of will be reversed and the cause remanded for further proceedings, in accordance with the views herein expressed, and the principles and rules governing courts of equity.

Reversed.

SANDERS, JUDGE, (*dissenting*:)

The decree of the circuit court is based upon the theory that at the time the defendant became a member of the association and at the time the loan was made to him, certain by-laws of the association were in force, providing that monthly dues should be collected from all members and stockholders of the association, and that some time thereafter the by-laws were changed so as to permit the directors to indefinitely suspend the payment of such dues, which they did, in pursuance thereto, thereby changing the contract entered into between the plaintiff and the association, and defeating the entire purpose and object thereof, and destroying its features as a building and loan association, and that this being done, the loan made should be treated as a simple loan, bearing the legal rate of interest. This conclusion of the circuit court, I think, is eminently correct, and I would affirm the decree.

The conclusion reached by the Court, in its majority opinion, and that reached by the circuit court, differs only in respect to the basis of settlement, it being held here that the indefinite suspension of dues amounted practically to a dissolution of the association, and that the settlement should be governed by the principles announced in the case of *Young* v. *Building Association*, 48 W. Va. 512. It does not appear from the record that the association, at the time of the suspension of the payment of dues, was insolvent, or that it is now insolvent, or has been disssolved, nor is there any such claim, but, so far as the record shows it is perfectly solvent and continuing. Therefore, it is improper to hold that the settlement made with the plaintiff should be upon the theory that the association is not a going concern. So far as we know, this plaintiff is the only member complaining of such suspension, and the only one who seeks a settlement

and desires to withdraw. This being so, the question arises, must he be required to fulfill the contract on his part by paying dues upon his stock until the time of such suspension? The association, by the indefinite suspension of dues, has entirely changed the contract of the plaintiff, by necessarily extending the maturity of his stock to a time far beyond that at which it would have matured if the contract had been carried out as entered into, and had been continued upon the plan and scheme of a building and loan association. This being so, the plaintiff should only be required to repay to the association the amount of the loan, with six per cent. interest, giving him credit upon the plan of partial payments for all payments he has made. It is said that he should be required to pay dues up to the time of the suspension, because to hold otherwise would be a hardship on the other stockholders and members of the association. Why is this so? He repays to the association the sum of money which it advanced to him, as a loan, with six per cent. interest. It is in no worse condition. The money that it advanced has been repaid, with its legal interest. When the plaintiff entered into his contract, the by-laws of the association entered into and formed a part of it, and these provided for the payment of dues, premium and interest in monthly installments until the maturity of the stock, but premium not to exceed eight years. By this plan there was a chance that the association, if its affairs were honestly administered, would mature its stock, within this term, from the earnings of the company. This the suspension of dues effectually prevents. The association disabled itself to perform its contract. It does not appear from the record but that the other stockholders have assented to and acquiesced in the change. The plaintiff cannot be bound by their acquiescence, nor is he required to contribute to the support of the association the dues paid by him to the time of the change, on the assumption that to hold otherwise would be a hardship on the other, and, so far as we know, assenting stockholders. The consideration for his contract has failed absolutely, and he has the right to treat it as abrogated, which he has done. This being so, nothing more should be required of him than the interest on the money received, but that, together with the principal, he should pay.

CHARLESTON

DUNFEE v. CHILDS.

Submitted June 4, 1904. Decided March 6, 1906.

1. EQUITY—*Bill of Review—Depositions.*
Upon a bill of review for error of law depositions cannot be considered. (p. 229.)

2. SAME—*Pendency of Appeal.*
A bill of review for error of law cannot be maintained while an appeal is pending in the Supreme Court of Appeals. (p. 230.)

3. APPEAL—*Dismissal—Time of Dismissal.*
When an appeal is dismissed by an order of the Supreme Court of Appeals, it stands dismissed and ended on the actual date of such order, and does not continue to exist as an appeal to the end of the term of the Supreme Court of Appeals. (p. 231.)

4. STAY OF PROCEEDINGS—*Discretion of Court—Pendency of Other Suit.*
A stay of proceedings in a suit provided by section 6, chapter 136, Code, rests in the sound discretion of the court. To warrant the stay it must be essential to justice, and it must be that the judgment of decree by the other court will have legal operation and effect in the suit in which the stay is asked, and settle the matter of controversy in it. (p. 233.)

5. EQUITY—*Bill of Review—Newly Discovered Evidence.*
A decree of the Supreme Court reversing, for error of law, a decree under which land is sold, is not newly discovered evidence for a bill of review to reverse a later decree of a circuit court dismissing a bill filed to set aside a deed made to the purchaser under such decree of sale by the former owner of the land after the sale and its confirmation. (p. 235.)

6. SAME.
The reversal by the supreme court is not newly discovered evidence or matter for a bill of review to reverse a decree of a circuit court made before such reversal. (p. 236.)

7. DEEDS—*Cancellation.*
Will a decree of the Supreme Court of Appeals reversing a decree of sale of land be alone ground for a bill to cancel a deed made to the purchaser under the decree by the debtor and owner of the land before reversal, when there is no other consideration for such deed than such decree of sale and purchase under it? (p. 237.)

8. VENDOR AND VENDEE—*Purchaser—Judicial Sale.*

Where a party to a suit interested in a decree for sale of a debtor's land by having a debt decreed him against the land is the purchaser under the decree of sale, and he then conveys the land, after confirmation of the sale and before a bill of review or appeal to reverse the decree of sale, to a *bona fide* purchaser for valuable consideration without notice actual of error in the decree, such purchaser's title is not affected by a reversal of the decree of sale on bill of review or appeal. (p. 238.)

9. LIS PENDENS—*Bill of Review.*

A suit as a *lis pendens* ends with a final decree. A bill of review or appeal to reverse such decree is a new *lis pendens*, as regards purchasers claiming title under the decree, and is not a mere continuation of the original suit. (p. 239.)

10. CANCELLATION OF INSTRUMENTS—*Purchaser for Value.*

A decree of cancellation of a deed for land for fraud, or duress, or want of consideration, cannot be made against a purchaser for valuable consideration without notice of the facts tainting the deed with fraud, duress or want of consideration. (p. 248.)

11. DEEDS—*Grounds of Invalidity—Fraud—Duress.*

A threat by one having good title to land and entitled to possession as purchaser under a decree of sale, as against the debtor occupying the land, to eject such occupant by process under the decree of confirmation of sale does not constitute fraud or duress to set aside a deed made by such occupant to said owner. (p. 249.)

12. VENDOR AND VENDEE—*Bona Fide Purchaser.*

One claiming land under either a quit-claim deed or a deed with covenant of special warranty may make the defense of a purchaser for valuable consideration without notice. (p. 249.)

13. DEEDS—*Form—Interest Conveyed.*

A deed of the form prescribed by section 1, chapter 72, Code, containing the words "do grant," though it contain a covenant of only special warranty, will pass the very land itself, and all estate, right, title and interest of the grantor therein. (p. 250.)

14. DEEDS—*Setting Aside Deeds—Laches.*

To set aside a deed for fraud suit must be brought in a reasonable time, a time reasonable under circumstances of the particular case. Delay, especially where it affects third persons, will bar relief. (p. 259.)

Appeal from Circuit Court, Tyler County.

Suit by James R. Dunfee and others against H. Childs,

Jr., and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

VAN WINKLE & AMBLER and DAVE D. JOHNSON, for appellants.

T. P. JACOBS, PUGH & PUGH, ROBERTS & CARTER, M. F. ELLIOTT, ERSKINE & ALLISON, and S. BRUCE HALL, for appellees.

BRANNON, JUDGE:

H. Childs & Co. brought a suit in equity in Tyler county to enforce judgment liens on land of Dunfee, and in it a decree was entered in August, 1891, to sell a tract of eighty-five acres of land of Dunfee for various debts, one of them to Hardman. Under this decree sale was made of said tract to Hardman, and the sale was confirmed in December, 1891. The decrees of sale and confirmation were by default. Dunfee filed a bill of review in April, 1894, but it was dismissed. On appeal to this Court the decree dismissing the bill of review was reversed for error of law, and the case was remanded to the circuit court. 45 W. Va. 155. The decree of reversal dates 6th May, 1898. In April, 1894, Dunfee and wife filed what is called a supplemental bill in the nature of a bill of review. In it the charge was made that Hardman chilled the bidding at the sale pretending to be buying the land with intent to let Dunfee redeem; and also that after his purchase Hardman, with knowledge that his title under the judicial sale was bad, went in company with a deputy sheriff, Hardman being at the time sheriff, to the residence of Dunfee on the land, and represented that Dunfee's wife had no contingent dower in the land, and that under his purchase he could at once turn them out of possession, and would do so, unless they would execute to him a special warranty deed to the land; but that if they would do so, he would let them remain on the land for the balance of the year 1892, from March; that under this representation, and supposing that their legal rights had been entirely taken away by the sale, and that Hardman knew what he stated to be true, in order to keep from being turned out of doors, they executed such deed to Hardman, dated 28th March, 1892. The deed recites a consideration of one hundred dollars paid and other valua-

ble consideration; but it seems that said $100.00 was not in fact paid. The bill alleges that there was no consideration but the promise not to execute the writ of possession, and allow Dunfee to remain in possession. A writ of possession had been awarded to Hardman by the court. On the date of the deed Dunfee took a lease of the land from Hardman. This bill alleged numerous errors of law in the decree of sale, and in this respect it was a bill of review, and in the other respect an original bill to cancel said deed for fraud, duress and want of consideration. For these causes this bill sought to reverse the decrees of sale and confirmation for error of law, and to set aside the sale, and also annul the deed from Dunfee and wife to Hardman. The bill states that Hardman had conveyed the land to McCoach, and McCoach had conveyed an interest therein to West, and they had leased the land for oil to Ludwig and Mooney, and they had assigned the lease to The Carter Oil Company. Under said lease large quantities of oil were produced. This bill of April, 1894, sought to charge those liable therefor with the oil royalty in favor of Dunfee. This bill set up the fact that there had been a bill of review, as above stated, to reverse the decree of sale for error of law, and that said bill of review had been dismissed by the circuit court, and that an appeal to this Court had been applied for, but did not say that such an appeal had been granted or was pending. The bill also averred that Dunfee and wife had then pending another bill of review in the circuit court to reverse the decree of sale, and asked that said bill of review be read with said supplemental bill. When the cause was called for hearing on said bill of April, 1894, Dunfee and wife moved the court to stay the hearing until an appeal, alleged in the motion to be pending in the Supreme Court, from a decree dismissing said bill of review filed to review the decree of sale should be determined; but the court refused to stay the case, and dismissed said supplemental bill in the nature of a bill of review. This decree was made in December, 1896. In May, 1899, Dunfee and others filed another bill, a bill of review, to reverse the decree of December, 1896, which dismissed said supplemental bill, and to set aside said deed to Hardman for fraud, duress and want of consideration. We may say this was for error of law. This bill also set up the fact that the

Supreme Court had reversed the decree of the circuit court dismissing the bill of review which had been filed to reverse the decree of sale and the sale under it. This was set up to have the effect of newly discovered matter to reverse the decree of December, 1896, dismissing said supplemental bill. Dunfee had died, and this last bill of review was filed by his heirs. On full defense this last bill of review was dismissed, by decree dating 10th of October, 1900. From this decree the plaintiffs have appealed.

The printed record contains 410 pages besides the record on the former appeal, and the briefs 381 pages, and the case has been complicated by numerous elaborate pleadings. It is to be noted that this appeal is only from the decree of October 10, 1900, dimissing the last bill of review. The question is, Should that decree be reversed? Instead of dismissing the bill of review of May, 1899, should the decree have been one reversing the decree of December, 1896, and cancelling the deed from Dunfee and wife to Hardman? At once I remark that we cannot consider whether the court upon the bill of April, 1894, ought to have set aside the deed from Dunfee and wife to Hardman, for the reason that that matter turned on depositions, which cannot be considered upon a bill of review. To reverse the decree of December, 1896, for that matter, there must have been an appeal from it bringing the evidence under review. By the decree the court found that the evidence did not sustain the attack on the deed, and it could not reach this conclusion except by considering the evidence. The depositions were voluminous and conflicting upon the questions of duress, want of consideration, misrepresentation and improper procurement of the deed. Error of a court upon questions of fact under evidence is not reviewable on bill of review. *Wethered* v. *Elliott*, 45 W. Va. 436; *Dunn* v. *Renick*, 40 *Id.* 349.

The last bill of review, that of May, 1899, assigns only two errors in the decree of December, 1896, one the failure to stay the case until decision of the Supreme Court: the other, "in dismissing the bill, because, upon the face of the decree as shown by the pleadings, the plaintiffs were entitled to the full relief prayed for." This is very indefinite and general. What is its meaning? The law requires definite assignment. This is hardly an assignment of error. If it means, as I sup-

pose it was intended, that the court erred in not setting aside the deed for fraud, we cannot consider it, as that hinges on the evidence. Of course, the decrees of 1891, are not involved, as they have been reversed, or we will say so. The only question presented by the last bill as error of law in the decree of December, 1896, to be considered by us, is, whether there is error in refusing to stay the hearing of the bill of April, 1894. We cannot look into the affidavits as to the mere matter of continuance not touching the stay.

It is claimed that there is error in the decree of December, 1896, dismissing the bill of April, 1894, because the circuit court failed to stay the proceedings until the decision of the Supreme Court on appeal from the decree of sale of August, 1891. But there was nothing to show that, in fact, such an appeal was pending. It is enough to close this question, the only question of law involved, that the record does not present this error, as a bill of review for error of law can only be sustained by error on the face of the decree. The motion to stay the suit, it is true, did aver that there was pending in the Supreme Court an appeal; but no showing of that kind was made by affidavit, record or otherwise. And as against the adverse party this averment amounted to nothing. The answers of Childs & Co. and The Carter Oil Company denied the pendency of such appeal, and the bill does not allege its pendency, and no showing of it was made by the record, and the mere statements of the plaintiffs in their motion would not show the existence of an appeal, as it would not establish the fact of the appeal as against the other parties. So, there is no error in the refusal of a stay. On the contrary, instead of there being ground to stay the case, there was ground under this head to justify the dismissal of the bill, because by their motion to stay the plaintiffs admitted the pendency of an appeal in the Supreme Court for the same matter for which they had filed their bill of April, 1894, and thus admitted that they had already an appeal pending to reverse the decree of sale for error of law, and therefore could not have a bill of review in the circuit court for the same error of law. Instead of that being matter to stay the case, it was matter calling for the dismissal of their bill, so far as it is to be viewed as a bill of review—so far as the error of law was concerned. There cannot be a bill of review for error of law while

an appeal is pending from the same decree. *Maxwell* v. *Martin*, 35 W. Va. 384; *Kimberly* v. *Arms*, 40 Fed. R. 548; *Ensminger* v. *Powers*, 108 U.S. 292. The record of the appeal on the old bill of review shows that the appeal was not granted until months after the decree of December, 1896, namely, 30th April, 1897. A former appeal there was, but it was dismissed four days before that decree, and in fact there was no appeal pending when that decree was rendered. Orders appended to a brief of Dunfee's counsel so show as to the first appeal; but legally we cannot look into them, as they are not part of the record. Therefore, the fact remains that it does not appear that any appeal actually existed at the date of the decree of December, 1896. This is enough to justify action on, and dismissal of, the bill of April, 1894, so far as the matter of stay is concerned, that is, so far as the action of the court refusing such stay is imputed as error, and that is the only matter of error of law involved in the decree of December, 1896, dismissing the bill of April, 1894, since the old decrees of 1891 are out of the way.

As there was no appearance of record to show the actual pendency of an appeal, it is unnecessary, except in deference to the point made by counsel to advert to the point that though the first appeal was dismissed on the 12th day of December, 1896, by the Supreme Court, yet this Court did not close its term until 31st December, 1896, and that the order dismissing the first appeal did not thus become final until 31st December, and was not in force on the 16th of December. This point is not tenable. For some purposes judgments relate to the first day of a term, for instance, as a lien; but hardly ever to the last day for any purpose. It is true that during a term the record is in the breast of the court, and may be set aside; but generally the date of actual rendition is the date by which the judgment is to be tested as to its force and operation. *Long* v. *Perrine*, 44 W. Va. 243, (28 S. E. 701). On December 12, 1896, the order dismissing the first appeal took effect; on that date that order put that appeal out of court; its life was gone for all purposes, and it had no existence on the 16th of December. Even if the 31st of December, the close of the term, had anything in the world to do with the question, when the term closed on that date, it would retroact and make the order dismissing the ap-

peal have full effect, in a legal point of view, on the date when it was actually made, the 12th day of December, and enable us to assert that on the 16th of December there was no appeal pending. We decided in *Creasap* v. *Creasap* (46 S. E. 582), 54 W. Va. 581, that the date of a judgment or decree as shown by the record, marks the point of time from which the limitation of a writ of error or appeal runs—that is, the actual day of the term on which it was made.

Let us suppose, however, that there was pending on the 16th of December, 1896, an appeal. The stay of proceedings was not material as to the matters of law involved in that appeal, the matters affecting the decree of sale. The question whether that decree should be set aside was fixed by the record of the appeal. In case of reversal, such reversal would remove the decree of sale without any aid from a decree on the bill of April, 1894, reversing the decree of sale.

Can we regard such stay of proceedings material as to that matter of the bill of April, 1894, which sought the vacation of the deed from Dunfee and wife to Hardman, dating 28th March, 1892? I think not. If we should say that a stay had been granted, and that the Supreme Court had reversed the decree of sale, and that this fact had been brought into the case by amendment of the bill of April, 1894, would it demand a decree reversing the decree of sale (supposedly already reversed by the Supreme court) and annulling the deed from Dunfee and wife to Hardman? If we concede that such reversal would alone constitute ground for the annulment of that deed, if Hardman still owned the land, yet could it be annulled as against McCoach and West and Ludwig & Mooney and The Carter Oil Company? Could a reversal of that decree by the Supreme Court upon the appeal, or by the circuit court under the bill of April, 1894, treated as a bill of review, affect those purchasers for valuable consideration, though it would affect Hardman? Could a decree upon that bill of April, 1894, treated as an original bill, setting aside that deed, affect the said purchasers, though they held title derivatively from Hardman? I hold that they could not be affected in either aspect, for the reason that they are purchasers for valuable consideration without notice. Further on I will seek to give reasons based on authority for this position. In connection with the subject of stay I will add, since that stay constitutes the

shibboleth of the appellants to sustain the claim of error of law in the decree of December 16th, 1896, which they would reverse by the last bill of review, that counsel cites section 6, chapter 136, Code, saying that "Whenever it shall be made to appear to a circuit court, or to the judge thereof in vacation, that a stay of proceedings in a case therein pending should be had, until the decision of some other action, suit or proceeding in the same or another court, such court or judge shall make an order staying proceedings therein upon such terms as may be prescribed by the order." This language vests a wide discretion in the court, and though it is not an arbitrary discretion, yet it requires a strong showing of prejudice to a party to reverse the action of a court for a refusal to make such stay. Some courts have held that such refusal is not reviewable. *People* v. *North R. Co.*, 53 Barb. 98. We do not see that such discretion was abused in this instance, even if we could see that there was any materiality, for the purposes of the case, under the bill of 1894, in the pendency of the appeal, as there could not be, because that appeal itself, if effectual, would operate on the decree of sale independently of any action under the bill of April, 1894. The statute itself requires that it be made to appear that a stay ought to be granted. It must appear that the stay was necessary to the ends of justice. It was not necessary in this case, for the reason that the appeal would decide on the error of law in the decree of sale, and for the further reason stated above that the rights of such purchasers could not be affected by a reversal of the decree of sale, or by annulment of the deed from Dunfee and wife to Hardman. Thus the stay would have been useless in a legal point of view. The stay must be on the ground that the action in the other case is material in the decision of the case stayed. We find it stated in 1 Ency. Pl. & Prac. 768, that "In order to authorize any court to stay proceedings on account of a suit pending in another court, the two proceedings must be practically identical." The statute has not been construed by this Court, so far as I know; but it must be very evident that it means to, first, vest a discretion in the court, and, second. that it must appear that the decision of the case in another court will have a material or controlling effect, in actual legal operation, upon the suit in which the stay is asked. The statute does not prescribe

the conditions calling for a stay, but any action under it must be governed by the common law principles relating to the subject. A suitor's suit cannot be suspended merely because a legal question may be common to the two suits. He has a right to demand that the court shall decide such question, and not wait for its decision by another court. The decision in the other suit must have legal effect in the suit in which the stay is asked, and close its litigation. If it operate on only one of two litigated matters, it ought not to be granted, because it does not cover the whole case.

Refusal of the stay is the only error of law imputed in the dismissal of the bill of 1894, specified in the bill of review of May 1899, and we have seen that this does not constitute a reason for reversing the decree of 16th December, 1896, dismissing the bill of April, 1894. I will add another reason why there is no error of law in such dismissal. The bill of April, 1894, states that Dunfee had then pending a bill of review to reverse the same decree of sale for the same error of law, and that it was yet pending. There could not be two bills of review for the same cause. This matter was pleaded in bar of the bill of April, 1894, and was cognizable on final hearing.

Thus we conclude that there is no error in the decree of October 10, 1900, upon the bill of May, 1889, based on error of law: First, because if there was pending an appeal from the decree of sale, that would prevent the court from reversing that decree under the bill of April, 1894; second, there was a bill of review yet pending in the circuit court to reverse the decree of sale; third, there was no evidence that an appeal was pending so as to show error in refusal of a stay before hearing the bill of April, 1894; fourth, because no reversal of the decree of sale or annulment of the deed of Dunfee and wife to Hardman could affect McCoach and other purchasers; fifth, if it had been assigned as error in refusing to reverse the decree of sale under the bill of May, 1899, the answer is that the Supreme Court had already done this. Though matter of error in the decree of sale, is incorporated in the bill of review of May, 1899, yet it is not assigned as error therein. So much for matter of law apparent.

But the bill of May, 1899, states that the Supreme Court

had reversed the decree of sale made in 1891, and claims that this should have induced the court to set aside the decree of December 16, 1896, on the ground of newly discovered evidence. The first reply to this is that this is not such new matter as calls for reversal on the last bill of review. All deffnitions of newly discovered evidence as a basis for a bill of review require that it shall relate to matters of fact existing at the date of the decree sought to be reversed by reason of such newly discovered evidence. But the decree of the Supreme Court reversing the decree of sale did not occur until long after the decree of 16th of December, 1896. No case is cited to sustain the proposition that this decree of reversal can be summoned as new matter to reverse a decree made before that reversal. A decision of the circuit court of the United States in New York, *Vetterlein* v. *Barker*, 45 Fed. R. 741, is the only case cited on the point. A decree in a collateral suit had been used in another suit as *res judicata*. That decree was later set aside as void for want of jurisdiction by the court which rendered it. This setting aside was presented as new matter in a bill of review. The court held that it could not be so used, because the decree had been set aside as void, but expressed the opinion that but for its being void it would be new matter for a bill of review. Likely so, because as *res judicata* it had been controlling and decisive; but in this case it is not so. I have already sought to show that a reversal of the decree of sale could not operate to call for a decree under the bill of April, 1894, reversing the decree of sale or annulling the deed of Dunfee and wife to Hardman, so as to affect said McCoach and other purchasers. Therefore, it is not such matter as would call for a different decree than that of the 16th of December, 1896, or of October 10th, 1900. Under neither the bill of April, 1894, nor of May, 1899, could any decree be rendered to the prejudice of McCoach and other purchasers. New matter, to be good for a bill of review, must be effectual to call for a different decree. *Machine Co.* v. *Dunbar*, 32 W. Va. 335; *Brown* v. *Nutter*, 54 W. Va. 82, (46 S. E. 375.) This is a second reason why that new matter is not effective to have called for a reversal of the decree of December 16, 1896, upon the bill of May, 1899. As to the claim that the decree of reversal of the sale decree is new matter good for a bill of review,

I will add that it would be needless to affect the decree of sale under the bill of May, 1899, because the reversal did that; and as to the refusal to vacate the deed from Dunfee and wife to Hardman, it could not reverse the decree of December, 1896, because the reversal occurred after that date. *Bledsoe* v. *Carr*, 10 Yerg. 55, holds that "The rendition of a decree in another court is not new matter within the meaning of the rule" that newly discovered matter is ground for a bill of review.

So, treating the bill of May, 1899, as a bill of review, we see no error in the decree of October 10, 1900, dismissing that bill. It is hardly necessary to say that we cannot look into the evidence bearing on the question whether the deed from Dunfee and wife to Hardman was procurred by fraud or coercion, because upon a bill of review we cannot look into such evidence, as that can only be done upon an appeal.

But suppose we treat the last bill, that of May, 1899, as an original bill to set aside the deed from Dunfee and wife to Hardman on the strength alone of the reversal by the decree of the Supreme Court of the decree of sale. There is, or might be, an objection to so treating this bill, on the ground that it unites matter for a bill of review and matter for an original bill; in other words, it asks to set aside the decree of December 16th, 1896, for error of law and new matter, and to treat it as an original bill would make it operate as an original bill to affect said deed on the strength of the reversal of the sale decree. "A bill cannot be maintained which seeks in the alternative to review a decree for error apparent, or to impeach and set it aside on the ground of fraud." *Gordon* v. *Ross*, 63 Ala. 363. The opinion in *Kimberly* v. *Arms*, 40 Fed. R. 559, takes the same view. But as there was no demurrer to the bill of May, 1899, for multifariousness, let us waive this defect, though this Court might *sua sponte* raise that question itself, without demurrer, and dismiss the bill. *Dunn* v. *Dunn*, 26 Grat. 296; Hogg's Eq. Proced. section 137; *Oliver* v. *Pratt*, 3 How. 411; 14 Ency. Pl. & Prac. 211. Then, treating this bill as an original bill setting up the fact of the reversal of the decree of sale, did it call for a decree annulling the deed from Dunfee and wife to Hardman? If that deed rested

alone upon the decree of sale, it would seem to do so. If, however, other consideration in fact enter into that deed, as for instance, if Hardman, had in fact paid the one hundred dollars money consideration stated in the deed, the reversal of the sale decree plainly would not affect that deed, for the simple reason of that additional new consideration; but that one hundred dollars was not in fact paid. There is another element of consideration stated in the briefs as a support for said deed, namely, that Hardman allowed Dunfee and wife to remain on the land and retain their home upon it from March 28th, 1892, to the close of the year. It is said that at that time there was no appeal pending from the decree of sale, and no step had been taken against it, and that Hardman's purchase was in full force. That decree of sale was not void, but merely voidable, and while standing unreversed gave Hardman perfect title and right of possession, and his permitting Dunfee and wife to retain possession under a lease made by Hardman to them constituted good consideration; it constituted a valid consideration for the deed when it was made; as things then stood, this lease was valuable consideration, and thus, in technical law, made the deed unimpeachable. But afterwards the sale decree is reversed, and that avoided it *ab initio*, and it goes to show that Dunfee only remained on his own land, and this would seem to do away with the retention of possession by Dunfee under the lease from Hardman as a basis of consideration for the deed. There was thus no money consideration, and this lease came to be no consideration by the retroaction of the decree of reversal in the Supreme Court, and so there was no consideration in fact for that deed. The consideration upon which it once rested fell from under it. Though it is not necessary to explicitly so decide, I incline to think that this decree of reversal would annul the deed from Dunfee and wife to Hardman, if Hardman still owned the land. I have forgotten to say that it is argued with great force that there is other consideration of value to defend the deed against the effect of that reversal, and that is, that the money paid by Hardman under his purchase under the decree went to pay Dunfee's debts, and is the same as if paid to Dunfee; but the answer to this may be that upon reversal Hardman would be en-

titled to be repaid that money, and to charge it on the land, and thus lose nothing.

But, for argument, let us say that the reversal of the decree of sale would, of its own force, as a new fact, an independent fact, call for the cancellation of the deed from Dunfees to Hardman. We do not feel called upon to say decisively whether or no such would be the case, treating the last bill as an original bill, as we would have to say if Hardman yet owned the land, or a royalty issuing from it, because he conveyed the land *outright* to McCoach, by deed dated 2d February, 1893, under an executory contract of sale dating 2d April, 1892, and McCoach conveyed an interest to West, and McCoach and West, on 18th April, 1892, leased the land for oil purposes to Ludwig and Mooney, and they entered and developed oil upon it. These transfers were made after the decrees of sale and confirmation, and after the conveyance of the land to Hardman under his purchase under the decree of sale, and before any bill of review had been filed, or any move made against the decree of sale. Could a reversal of those decrees by the Supreme Court under the appeal from a decree made upon the bill of review dismissing it, or by a reversal of said decrees as asked by the bill of review of April, 1894, affect McCoach or those claiming under him? Such reversals could not do so, because McCoach was a complete purchaser for valuable consideration without notice. Did McCoach have notice? Notice of what? When he purchased there was a final decree and no bill of review. Surely he was not bound to notice the single technical error which alone caused the reversal later of the decree of sale, that is, the failure of the record to show that the land would not by rents in five years pay the debts. This defect did not render the decree void, but only erroneous and voidable. *Waldron* v. *Harvey*, 54 W. Va. 610. This fact is material, for if the decree were void, it would be different, as if there were no jurisdiction of the subject matter or parties. If void, the decree would be *nil* and would confer no title on the purchaser. *Hoback* v. *Miller*, 44 W. Va. 635. And the purchaser having no title, could not confer it; but Hardman had title perfectly valid while the decree stood unreversed, and McCoach had right to think that as the court had decreed a sale, that sale would confer good title.

The argument is made that McCoach was a *pendente lite* purchaser. How can this be so? The case in which the sale was made had been ended by final decree. A man cannot be such a purchaser after final decree. "During the interval between final judgment and commencement of proceedings in error, there is no suit pending, and a purchaser in good faith does not take title *pendente lite*, and is not affected by subsequent reversals of the judgment." *Cheever* v. *Minton*, 13 Am. St. R. 258. In that case the court held the writ of error a new suit. We cannot say that the original suit in which the decree of sale was made and the bill of review and the appeal upon it make one and the same continuous suit, and thus find that though McCoach purchased from Hardman after final decree and before bill of review or appeal, he was a *pendente lite* purchaser; for such bill of review and appeal are new suits, not a continuation of the same suit for the present purpose. We can safely say with Judges Lee and ENGLISH in *Claytor* v. *Anthony*, 15 Grat. page 526, and *Keck* v. *Allender*, 37 W. Va. 210, that "a bill of review forms no part of the proceedings in the original cause." "It is a new suit," said Judge Cabell in *Laidley* v. *Merrifield*, 7 Leigh 353. This is because the old suit has ended by final decree. The Virginia court of appeals in a very late case held good the title of a purchaser from a party to the suit made between the decree and filing of a bill of review or petition for rehearing. *Va. Iron Co.* v. *Roberts*, 103 Va. 661. A bill of review or appeal is a second *lis pendens*, and must have its own notice. It does not relate back to the rendition of the judgment or decree. 2 Cyc. 510; Bennett on Lis Pendens §§ 40, 70; *Woolridge* v. *Boyd*, 13 Lea 151; 21 Am. & Eng. Ency. L. (2d Ed.) 618; *Scudder* v. *Sargent*, 17 N. W. 369; *Hollister* v. *Mann*, 58 N. W. 1128; *Taylor* v. *Boyd*, 3 Ohio 337 (17 Am. Dec. 603); *Lee County* v. *Rogers*, 7 Wall 181; *Warren County* v. *Marcy*, 97 U. S. 96; *Ludlow* v. *Kidd*, 3 Ohio 541; Barton's Chancery Prac. 331; *Cole* v. *Miller*, 32 Miss. 89; *Bank* v. *Jenkins*, 104 Ill. 143; *Macklin* v. *Allenberg*, 100 Mo. 343. In *Rector* v. *Fitzgerald*, 59 Fed. R. 808, the Circuit Court of Appeals held that where a final decree dismissed a suit filed by Rector, which dismissal was in 1881, and in 1884 Fitzgerald took a mortgage on the land involved from the grantee of the defendant who had prevailed in the suit,

and afterwards Rector filed a bill of review against Fitgerald and his grantor to reverse the decree dismissing the bill for error appearing on the record, Fitzgerald was a purchaser in good faith, and that after the term at which a final decree in favor of his grantor had been rendered, his title could not be affected by a decree subsequently rendered on a bill of review subsequently filed. It also held "that a bill of review will not be regarded as a continuation of the original suit so as to affect with notice a person purchasing the property in controversy in good faith from the successful party after a final decree and without notice that a bill of review is to be filed." In *Rector* v. *Fitzgerald*, 59 Fed. R. 808, the Circuit Court of Appeals reviewed the cases and from them concluded: "We are of opinion, on principle and authority, that a bill of review ought not to be regarded as a continuation of the original suit, merely for the purpose of affecting a purchaser in good faith after final decree with notice. In our judgment one who purchases after the term at which a final decree is rendered, without notice that a bill of review is contemplated or will be exhibited, should be protected from the effect of a decree on such a bill, if subsequently filed."

I ask if it can possibly be law that one who buys or recovers land under decree must wait three years for a bill of review, or two years for an appeal, or five years for a motion to reverse, before he can sell to a *bona fide* purchaser and give him good title? Is it the policy of the law to thus tie up land? The decree is presumed to be right until reversed. May not the victor in the suit or the purchaser act upon this presumption. "The successful party ought not to have his title clouded and the value of his property correspondingly diminished for three years by two doubtful contingencies: 1. That a writ of error will be sued out; and 2. That a reversal will take place." *Cheever* v. *Minton*, 13 Am. St. R. 258. So says *Bank* v. *Bank*, 6 Peters, p. 17.

The case of *Lynch* v. *Andrews*, 25 W. Va. 751, cannot be used to show that the purchasers were *pendente lite* from Hardman. It is not authority in this case, because the decrees were not final, I mean the decrees of sale and confirmation, as there was a reservation of right to make final adjudication. From the case of *Camden* v. *Haymond*, 9 W. Va. 680,

and 22 W. Va. pp. 184, 188, it will appear that the decrees involved in *Andrews* v. *Lynch* were pointedly held to be interlocutory. That matter was *res judicata* when the case of *Andrews* v. *Lynch* was decided, and was so treated in its decison. The decrees being interlocutory, not final, the purchaser was regarded as a purchaser *pendente lite;* but in this case there was no reservation as there was in those decrees. The decrees in this case were final in every sense, and the purchasers from Hardman were not *pendente lite* purchasers. Again, the decrees against Andrews were void for want of service or appearance.

In volume 9, page 1, of that excellent equity work, American and English Decisions in Equity, will be found valuable authority to support this holding. It reports the West Virginia case of *Ohio River Co.* v. *Fisher*, Circuit Court of Appeals, 115 Fed. 929. This case protected *bona fide* purchasers purchasing between the decree and a filing of a bill of review. The Circuit Court of Appeals affirms the rule put in the case of *Rector* v. *Fitzgerald* holding that a bill of review is not a continuance of the old suit, but a new one and that a third person *bona fide* purchasing under a decree afterwards reversed is not affected by the reversal. "Subsequent reversal of a decree of chancery does not affect the title of a *bona fide* purchaser who has acquired under such decree before suit in error to reverse it was commenced." *McCormick* v. *McClure*, (Ind.) 39 Am. Dec. 441. This case says that one may purchase before appeal with safety. The opinion says that the appeal is a new suit.

Pomeroy Eq. sec. 632 (3rd Ed.) says that if the unsuccessful party is entitled to appeal, he must do so in a reasonable time to keep the *lis pendens* alive. Even under this rule the *lis pendens* had ceased, as the bill of review was not filed for thirty-two months after the decree.

So there was no proceeding pending when McCoach got his deed to make him a *pendente lite* purchaser.

The bill of April, 1894, alleges that Hardman was guilty of wrongful conduct in chilling the bidding at the court sale, so as to keep down the price, and that he purchased with intent that Dunfee should redeem. If we had before us an appeal from the decree on that bill, we could examine the evidence to see whether this charge is true, and whether Mc-

Coach knew of it; for if he did not, of what avail is it, though true? If that evidence were before us, and would show the charge to be true as to both, then we could determine whether in fact Hardman bought on a trust which would be based on sufficient consideration and would be valid and enforceable in equity, though only oral. But we have before us an appeal from a decree of October 10th, 1900, dismissing the bill of April, 1894, to see whether there is error of law in such dismissal; in other words, we have before us a bill of review, and we cannot look into the evidence to prove notice on McCoach or that Hardman was guilty of any such conduct at the sale. We cannot look into the depositional evidence to convict Hardman of fraud upon a bill of review. *Dunn* v. *Renick*, 40 W. Va. 349; *Wethered* v. *Elloitt*, 45 *Id.* 436. So, we must regard McCoach and those claiming under him in the light of purchasers for valuable consideration without notice, and then inquire whether by law they can be affected by a reversal of the decree of sale. We do not deny the rule given in *Bank* v. *Bank*, 6 Pet. 8, and stated in the books *passim*, namely: "On the reversal of a judgment, the law raises the obligation in the party to the record who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost." *Fleming* v. *Riddick*, 5 Grat. 272; *Keck* v. *Allender*, 42 W. Va. 420. But that does not apply to this case. In the case just mentioned, *Bank* v. *Bank*, after saying that on reversal, the losing party must be restored to what he lost by the judgment, the court further said: "But as it respects third persons, whatever has been done under the judgment, while in force, is valid and binding. A contrary rule would be extremely inconvenient, and in great measure tie up proceedings under a judgment during the whole time within which a writ of error may be brought. If a bare intention or declaration of intention to bring a writ of error will invalidate what is afterwards done, should the judgment at any future day be reversed, it would virtually, in many cases, amount to a stay of proceedings on judgments." *Lovett* v. *German*, 12 Barb. 83. The general rule is well established that a reversal of a decree does not affect purchasers for value without notice. Hogg's Eq. Princ. section 293; 3 Cyc. 462, 467; *Zollman* v. *Moore*, 21 Grat. 313; *Gould* v. *Sternberg*,

15 Am. St. 138; *Reynolds* v. *Harris*, 76 Am. Dec. 459. The authorities are very numerous, and almost of one voice, to show that a stranger to a case purchasing land under a decree, though it be erroneous, is not affected by its reversal, nor is a purchaser from him. *Hughes* v. *Hamilton*, 19 W.Va. 366, (point 15). This is now statute. Code, chapter 132, section 8. See *Machlin* v. *Allenberg*, 100 Mo. p. 342. But the authorities, by great preponderance, hold that when the purchaser is a party to the cause in which the sale is made, and has a substantial interest in the debt or cause for which the land is sold, his title perishes with the reversal of the decree. *Dunfee* v. *Childs*, 45 W. Va. 155; *Klapneck & White* v. *Keltz*, 50 W. Va. 331; *Frederick* v. *Cox*, 47 *Id.* 14. In this case, however, the purchase, was not by a stranger, but by Hardman, who filed a petition in the suit in which numerous debts, among them a considerable sum to him, were decreed against the land, and thus he was a party interested in the decree; but he having conveyed to McCoach, we meet the question whether McCoach is to be regarded a purchaser for valuable consideration and protected from loss of title by reversal of the decree of sale. Authorities above cited answer that he is protected. As the title of a stranger to the cause purchasing under a decree does not fall with reversal, why should the title of one purchasing from a party not be likewise protected? Both are strangers to the cause, both alike innocent, and it would seem that like principles would apply to both. I think the statement of law made in *Dunfee* v. *Childs*, 45 W. Va. 155, after stating that the title of a party falls with reversal, that "there is an exception where the sale is to a stranger *bona fide*, or where a third person has *bona fide* acquired some collateral right before reversal," is borne out by the authorities there cited and many others. In denial of this position reliance in some cases has been placed on the maxim *Nemo potest plus juris in alienum tranferre quam ipse habet* (No one can transfer to another more right than he himself has); but this does not apply to such purchaser. "The purchaser must be regarded as a purchaser without notice, since he buys from a party who derives title from a judgment and execution valid at the time, and really occupies the same position as if he had himself bought at the sheriff's sale. Whilst, therefore, the

title of the plaintiff would be annulled by the reversal of the judgment, the sale or conveyance to a third person before reversal of the judgment, would be valid, and the purchaser, supposing the purchase to be in good faith, would be protected from the risks which his vendor would be subject to." *Vogler* v. *Montgomery*, 54 Mo. 577; *Waddham* v. *Gay*, 73 Ill. 415. Where title is vested in one by decree, and he conveys to another *bona fide*, title in him is not affected by the reversal. *Hanna* v. *Hanna*, 110 Ill. 53. Many cases hold that a stranger purchasing of a party who purchased under a decree is not affected by reversal. Notes to *McGilton* v. *Love*, 54 Am. Dec. 455, and *Little* v. *Munce*, 28 *Id.* 371; *Lorett* v. *German Church*, 12 Barb. 67, (28 Am. Dec. 371), note; Rorer on Judicial Sales (2d Ed.) section 1142; *Dater* v. *Troy Co.*, 2 Hill 529; *Davis* v. *Watson*, 54 Miss. 679; *Evans* v. *Kahr*, 60 Kan. 719; *Guiteau* v. *Wisely*, 47 Ill. 433. "When, after entry of a decree quieting title to real estate in a party to the suit, he conveys to a *bona fide* purchaser, no appeal bond having been filed, a subsequent reversal of such decree upon appeal will not affect the purchaser." *Parker* v. *Courtnay*, 26 Am. St. R. 360. "The party thus invested (by decree) with title and possession sold and conveyed to a third person who stands before the court as an innocent purchaser for valuable consideration, without notice. Can his rights be divested by a reversal of the decree on which his title was originally founded? We are of opinion that he cannot be so divested." So says the opinion in *Taylor* v. *Boyd*, 3 Ohio 337, (17 Am. Dec. 603), a well considered case. In that case the syllabus reads thus: "Reversal of a decree under which a purchaser in good faith, before a service of citation in error, acquired title, does not divest the title of such purchaser." In that case Boyd sued Taylor to get a deed for land, and obtained a decree for a deed. Taylor brought a writ of error. Later Boyd conveyed to another Boyd, after writ of error, but before citation in it. Boyd's title was held good against reversal. It was contended that the purchaser Boyd was a purchaser *pendente lite;* but it was held that the writ of error was a new suit and that he was not a *pendente lite* purchaser. In *McCormick* v. *McClum*, 6 Blackford 474, (39 Am. Dec. 441), McCormick filed a bill to recover land and obtained a

decree and took possession. The decree was reversed. On motion for a writ of restitution it appeared that McCormick had conveyed to Justice after decree and before appeal, and it was held that the suit was not pending, and that the *bona fide* purchaser took valid title. In *McAusland* v. *Punt*, 93 Am. Dec. it is held that "Grantee of a judgment creditor, who purchases the debtor's land at a sale under a judgment, acquires good title, notwithstanding the judgment is afterwards reversed." It is there held that the maxim, "No man can transfer a greater right than he himself possesses," is subject to many exceptions. The court said that it was not denied that if a third party had purchased, his title would be good, thus saying that one purchasing from a party who had purchased was governed by the same principles. There are some contrary decisions. See Freeman on Executions, section 347; *Singley* v. *Warren*, 63 Am. St. 896. But which is the more sound rule, which the more conforms to sound public policy, that is, the policy that judgments and decrees rendered by the courts of the country in cases of lawful jurisdiction shall have some efficacy, and inspire some confidence, so that persons not parties to the suit may buy upon the faith of those judgments and decrees with some reliance and confidence? The Constitution and statutes make the courts the arbiters of man's property controversies, and when those courts have decided a property controversy and subjected property to sale and transfer, why should not the business world act under them with reliance and safety? Great importance is attached by the appellants to the Kentucky case of *Clark* v. *Farrow*, 52 Am. Dec. 552, containing the syllabus reading thus: "Purchaser of property in litigation after final decree is a purchaser *pendente lite*; he is not a necessary party to a bill of review, but is bound by the decision upon any bill of review or writ of error." "Purchaser at a sale under final decree generally takes a good title, though the decree be afterwards reversed." This syllabus in holding a purchaser after final decree, if it means either before or after a bill of review or appeal, or rather, if it means a purchaser after final decree and before bill of review or appeal, is surely too broad. Authorities cited above show this. That case, however, differs widely from the case we have in hand. In that case Farrow sued for the specific performance by Clark's

heirs of a contract for the sale of a lot, and obtained a decree and a conveyance of the lot to him, and afterwards conveyed the lot to Wright. Still later the decree was reversed and the contract was rescinded. As applied to the case of specific performance, or a suit to get title, the doctrine of that Kentucky case may be right. We are not called upon to say as to this; but I call attention to the fact that it is in direct antagonism to *Taylor* v. *Boyd* and *McCormick* v. *McClum*, above cited. But the Kentucky case sustains the proposition made by this opinion, that where the case is one, not of specific performance, or one of like kind, but a case of sale for debt under decree, one buying from a purchaser under decree, though such purchaser be a party interested, takes good title unaffected by reversal. In that case the court drew this distinction pointedly in the syllabus based on the following language of the opinion: "And we barely remark, in addition, that a title passed by a commissioner's deed under a decree for specific performance and other similar cases, stands upon different ground from that of a title derived under a decree of sale, and an actual sale; because, in the former case, the conveyance of title rests wholly on the decree, and is the same as if it existed in the decree alone, there being no meritorious act done under the authority of the decree which might give additional efficacy to the conveyance. But in other cases, as of a sale under a decree, the purchase is of itself a meritorious act, authorized by the decree and creating an equity; and it is a matter of interest to all parties, and to the public, that such sales, if fairly made, should be sustained, and they are sustained, though such decree be afterwards reversed. They are sustained, too, though the purchaser be the successful party to the suit, because he does not get the land by the direct operation of the decree itself, but by proceedings which it authorizes; and for this reason he is not compelled, upon a reversal, to restore the land, but to restore the price or money which it brought, and which alone he gets by the direct operation of the decree; on these, and perhaps other grounds, may be placed the distinction which has been uniformly held between the effect of reversal of decrees for sale, or under which sales have properly taken place, and decrees for conveyance of title where that is the object of the suit, and the very thing decreed." That Kentucky case strongly supports

the cause of the appellees in this case, and is strongly against the appellants. So, we conclude that the reversal of the decree of sale cannot affect the title of McCoach and those claiming under him, though under our law it would affect Hardman, if he yet owned the land.

Next we consider the demand of the bill of April, 1894, to set aside the deed of March 28, 1892, from Dunfee and wife to Hardman. The Court could not set aside that deed to the prejudice of McCoach, because he was purchaser for valuable consideration without notice of the misrepresentation, coercion, or want or failure of consideration on which the attack upon that deed was predicated. We find in 2 Story Eq. Juris. § 1503, the following basic principle applicable as well to the demand to set aside said deed as to the claim that the reversal of the decree of sale destroyed the title of McCoach and those claiming under him: "In short, courts of equity will not take the least step imaginable against an innocent purchaser in such a predicament; and will, on the other hand, allow him to take every advantage, which the law gives him; for there is nothing which can attach itself upon his conscience in such a case in favor of an adverse claim." Remember we are in a court of equity, which never lifts its hand by affirmative action hurtful to a purchaser *bona fide* for valuable consideration. Reflect that McCoach, under judicial sale and under the deed from Dunfee and wife, obtained legal title, and would thus prevail in a court of law, and equity will not make his condition worse by depriving him of legal title which gives him advantage in a court of law; for as Judge Moncure said in *Burwell* v. *Fauber*, 21 Grat. p. 463, "Certainly a *bona fide* purchaser for value, and without notice, is a great favorite of a court of equity, and that court will not disarm such a purchaser of a legal advantage." We find it stated in *National Valley Bank* v. *Harman*, 75 Va. p. 609, that Lord Rosslyn said what is approved by the Virginia court and held everywhere as equity law: "I think it has been decided, that against a purchaser for valuable consideration without notice, this court will not take the least step imaginable. You cannot even have a bill to perpetuate testimony against him. I am pretty sure it is determined that no advantage the law gives him will be taken from him by this court. The doctrine as to the jurisdiction of this court is

this: You cannot attach upon the conscience of the party any demand whatever where he stands as a purchaser, having paid his money and denies all notice of the circumstances set up in the bill." The Virginia court said that this doctrine had been repeatedly sanctioned by that court and the Supreme Court of the United States, citing *Boone* v. *Chiles*, 10 Pet. 177, 211; *Carter* v. *Allen*, 21 Grat. 241, 247; *Tompkins* v. *Powell*, 6 Leigh 576. See *Lough* v. *Michael*, 37 W. Va. 679; *Turk* v. *Skiles*, 45 W. Va. 82. Rescission of a deed for fraud cannot hurt a *bona fide* purchaser. 14 Am. & Eng. Ency. L. (2 Ed.) 163. "The relief of cancellation will not be granted against a *bona fide* purchaser for value without notice of the fraud or other ground for cancellation." 6 Cyc. 319; *Carter* v. *Allen*, 21 Grat. 241. In that case the court holds thus: "A purchaser for value without notice, actual or constructive, having obtained a conveyance will not be affected by a latent equity, whether by lien, or incumbrance, or trust, or fraud, or any other claim." "From a purchaser for value without notice this court takes nothing away which the purchaser has honestly acquired." 1 Am. & Eng. Dec. in Eq. p. 249 and 110.

There is another decisive view against the appellants. The bill of April, 1894, charges that Hardman knew of the error infecting the sale decree. He was not bound in law to notice it, and actual notice of it ought to be proven. The bill charges that Hardman at the sale bought under the pretense of allowing a redemption by the Dunfees, and that he employed coercion by threatening to eject Dunfee from the land, unless he would make the deed of March 28, 1892, and that he represented that he had the right to do so, and that Mrs. Dunfee had no contingent right of dower, and that the one hundred dollars stated as the consideration for the deed was not paid, and that McCoach and West had notice of all these things. Whether these charges are true or not depends wholly on evidence contained in depositions, and under authorities above cited, as we are deciding upon a bill of review, we cannot read those depositions to sustain these charges against Hardman and McCoach, as we could do upon an appeal from the decree of 16th December, 1896. Therefore, those charges are impotent in this case to fix fraud or misconduct on Hardman or knowledge or notice on McCoach. We have no read-

able evidence to sustain those charges. If Hardman made such statements they constitute no fraud, no duress or coercion. He owned the land under a confirmed sale giving him, at that time, perfect title, and he was entitled to possession, and could lawfully have enforced it by the writ of possession which had been awarded by the court. And as Mrs. Dunfee had joined in a deed of trust for one of the debts decreed against the land, she had no dower in the land itself; but as some persons had told her that she had, and as she set up such claim, which would frighten oil men from buying, or leasing, Hardman naturally desired to close that trouble by her deed. As she had nothing in the land, he might fairly ask the deed, and as to her the lease would be a consideration, and by the deed he took nothing from her legally belonging to her. There was neither fraud nor duress nor coercion in this, to affect the deed, as shown by cases cited in *Whittaker* v. *Southwest Improv. Co.*, 34 W. Va. 217, 226.

But it is contended that McCoach cannot occupy the position of a *bona fide* purchaser, because he holds the land under a special warranty deed. Seeing that a special warranty deed would give McCoach the cast and character of a *bona fide* purchaser, counsel frequently call this deed a quit-claim deed, and rely on some cases holding that a purchaser under a quit-claim deed cannot make the defense of a *bona fide* purchaser, but that position is not sound law. "The receipt of a quit-claim deed does not of itself prevent a party from becoming a *bona fide* holder; and the doctrine expressed in many cases that the grantee in such a deed cannot be treated as a *bona fide* purchaser does not rest upon any sound principle. It is asserted upon the assumption that the form of the instrument, that the grantor merely releases to the grantee his claim, whatever it may be, without warranty of its value, or only passes whatever interest he may have at the time, indicates that there may be other and outstanding claims or interests, which may possibly affect the title, and, therefore, it is said that the grantee, in accepting a conveyance of that kind, cannot be a *bona fide* purchaser and entitled to protection as such, and that he is in fact thus notified by his grantor that there may be some defect in his title, and he must take it at his risk. This assumption we do not think justified by the language of such deeds or of the gen-

eral opinion of conveyancers." *Moelle* v. *Sherwood*, 148 U. S. 21. The same doctrine is held in *U. S.* v. *Land Co.*, 148 U. S. 31, and *Brown* v. *Jackson*, 3 Wheat. 451, as shown in the opinion filed by me in *Ellison* v. *Torpin*, 44 W. Va. p. 435. The Supreme Court of the United States, as there stated, has changed its ruling as to this, and has come to the conclusion that a purchaser under a quit-claim deed may be a *bona fide* purchaser. I refer to the authorities there cited for the proposition. But this is not a quit-claim deed. It is a statutory deed prescribed by chapter 72, section 1 of the Code, with a covenant of special warranty, and in its granting clause contains the words, "do grant unto the said party of the second part, with special warranty, all that certain lot, tract or parcel of land." By the very letter of section 2, "Every such deed, conveying lands, shall, unless an exception be made therein, be construed to include all the estate, right, title and interest whatever, both at law and in equity, of the grantor in or to such lands." This surely passes the very land itself, under that statute, whether the deed be one of special or general warranty. *Turk* v. *Skiles*, 45 W. Va. 82. The operative words "do grant" are the same prescribed by the statute for both a special and general warranty deed, and plainly operate alike in their granting or transferring effect, the only difference being, not in the force of the instrument to pass title, but in the obligation and effect of the warranty. Hence the character of the deed does not deprive McCoach of the benefit of the position of a purchaser for valuable consideration.

I have said that we cannot read the depositions for decision, and therefore we need not state their contents; but as bearing on the substantial justice of this case I will say that the depositions fall far short of sustaining the charges of fraud, coercion and misrepresentation against Hardman, and proving notice thereof on the part of McCoach. Even if Hardman were culpable in the manner of his procurement of the deed, there is no evidence to show that McCoach and those claiming under him had notice of it. Therefore, McCoach would be protected against this charge of fraud in the procurement of the deed. The law above given touching the protection of an innocent purchaser against loss of title by the reversal of a decree fully applies to protect McCoach

against the demand for cancellation of the deed. Look at the reasonableness of his position. He saw the fact that Hardman had purchased at an open judicial sale, and he also saw the deed of Dunfee and wife to Hardman, and further that Dunfee had recognized Hardman's title, by leasing 28th March, 1892, the land from Hardman. Had not McCoach the right to act on this with honest confidence? And this confidence was inspired by the fact that Dunfees had made the deed and taken the lease. Their plain acts thus led McCoach to buy, and where one of two innocent parties must suffer loss, that loss must be borne by that one "who by his conduct, acts or admissions has rendered the injury possible." *Norfolk & Western Railroad Co.* v. *Perdue*, 40 W. Va. 442: *McConnell* v. *Rowland*, 48 *Id.* 276; *Roberts* v. *Tavenner*, 48 *Id.* 632; *Somes* v. *Brewer*, 13 Am. D. 406.

It is charged that Hardman, when he got the deed, knew there was error in the decree of sale that would invalidate the sale. Will the law say that he was bound to be a jurist, seer and prophet and anticipate the effect of the single technical error affecting the deed, for the purpose of fixing actual fraud in his mind? I know that for some purposes a purchaser is bound to know defects in his chain of title; he is bound to know the contents of a record under which he claims for certain purposes and to a certain extent, as, for instance, if he buys under a decree, he must see that the court has jurisdiction of the subject matter and the parties; but is it possible that he is bound to know in advance the effect of every error and irregularity for which the decree may be in the end reversed, when such error does not affect the authority and jurisdiction of the court? But even say that Hardman and McCoach were bound to see this defect in the decree; say that you can use this for the purpose of fixing intentional fraud in the mind of Hardman, then I ask why did Dunfee allow Hardman to avail himself of that fraud by making a deed? Did not Dunfee have the same means to know of that defect in the decree as Hardman had? Was not the same avenue of information open to Dunfee as to Hardman? If Hardman took the deed with knowledge of that error, so did Dunfee make the deed with like knowledge.

It is charged that negotiation was commenced by McCoach to purchase of Hardman before Hardman got the deed from

Dunfee, and that this is evidence of notice on the part of McCoach. The evidence is clear and preponderating that McCoach did not begin such negotiation before the execution of the deed; but what if he had done so? He had a right to do so. Hardman was vested with title by a confirmed judicial sale, and why had not McCoach a right to buy under that? How would that show either that he knew of any defect in the decree, or had any fore-knowledge of the execution of that deed?

And another point is this. If there was anything wrong in the procurement of that deed, why did not Dunfee attack it sooner after March 28, 1892, than April, 1894? He having knowledge of every circumstance connected with the execution of his deed, the law demanded quick attack, especially when he and his wife, living on the land, saw the oil operators spending thousands of dollars in their uncertain enterprise of development. He waited too long to invoke the power of equity to overthrow rights in those people. The many cases cited in *Whittaker* v. *Southwest Improv. Co.*, 34 W. Va. 217, will establish this. "To set aside a sale for fraud and conspiracy, suit must be brought within a reasonable time after the discovery of such fraud." *Williams* v. *Maxwell*, 45 W. Va. 297. As oil operations were going on before Dunfee's eyes, and as he knew that those engaged in them were resting on his deed, equity would require, in this particular case, prompt and speedy attack. And I will mention as pertinent here the fact that on the 2nd of January, 1893, McCoach having before that purchased the land by executory contract of Hardman, Mrs. Dunfee leased the house on it from McCoach, and thus inspired confidence in the title of the operators.

The law of estoppel plays an active part in this case also. Dunfee and wife made that deed to Hardman, and they took those leases from Hardman and McCoach, thus admitting title in Hardman and McCoach, and they rested quiet and silent upon that land seeing money expended in oil operations, knowing that Hardman relied upon the judicial purchase, the deed and his lease to Dunfee, and knowing that the oil operators relied upon them, and went on with their expenditures, and they made no protest. These facts not only call for speedy notice of dissatisfaction to those interested, and

speedy suit, but it operates as an estoppel and bar in equity against any relief. "If a person knowing his rights, stands by and encourages or permits an innocent party to purchase his property or make valuable improvements upon it, without making known his rights, he is estopped from making any claim to it." *Heavener* v. *Godfrey*, 3 W. Va. 426. See *Bates* v. *Swiger*, 40 W. Va. 741; *Norfolk & Western Railroad Co.* v. *Perdue*, 40 W. Va. 442; *Williamson* v. *Jones*, 39 W. Va. 231.

I need hardly say that some evidence was given to show that after the delivery of the deed of Dunfees to Hardman, Hardman said that if he could sell the land for oil for enough to pay his debt due from Dunfee, he would give Dunfee the surface. This is not in the bill. It was after delivery of the deed, and cannot affect that. If such agreement were made, it was voluntary, based on no consideration, merely oral and not enforceable. In no view does it play any part in this case. Decree affirmed.

Affirmed.

CHARLESTON

THACKER COAL CO. v. BURKE.

Submitted February 16, 1903. Decided March 6, 1906.

1. MASTER AND SERVANT—*Enticing Servant.*

   One who maliciously entices a servant in actual service of a master to desert and quit his service is liable to action therefor. (p. 254.)

2. SAME—*Liabilities.*

   If one wantonly and maliciously, whether for his own benefit or not, induces a person to violate his contract with a third person to the injury of that third person, it is actionable. (p. 254.)

3. SAME.

   Persons who conspire to induce others to break a valid contract between other persons are liable to action therefor, (p. 259.)

4. SAME.

The act found in Code of 1899, section 14, appendix, p. 1053, does not authorize any individual, or number of individuals, to maliciously entice servants to desert service in which they are engaged, or to prevent them from engaging in such service under a contract for such service. (p. 262.)

Error to Circuit Court, Mingo County.

Action by the Thacker Coal & Coke Company against Charles Burke and others. From a judgment sustaining a demurrer to the declaration, plaintiff appeals.

Reversed.

RUCKER, ANDERSON & HUGHES and SHEPPARD & GOODYKOONTZ, for plaintiff in error.

J. H. GAINES, J. L. STAFFORD, and DOUGLASS W. BROWN, for defendants in error.

BRANNON, JUDGE:

The Thacker Coal and Coke Company filed a declaration in trespass on the case in the circuit court of Mingo county against Charles Burke and five others for damage for enticing servants from the plaintiff's service, which declaration upon demurrer was dismissed, and the company sued out a writ of error.

Certain legal principles control the case. In *Transportation Co.* v. *Oil Co.*, 50 W. Va. 611, we find it stated, on authority there given, that "If one wantonly and maliciously, whether for his own benefit or not, induces a person to violate his contract with a third person to the injury of that third person, it is actionable."

We find that holding confirmed in *Angle* v. *Chicago Railway*, 161 U. S. 1, in the language following: "If one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can sustain an action against the wrongdoer. When a man does an act which in law and fact is a wrongful act, and injury to another results from it as a natural and probable consequence, an action on the case will lie." If additional authority were needed for such a proposition of common sense and justice see the case decided by the highest English tribunal in 1901, *Quinn* v. *Leathem*,

App. Cases 1901, 495. What I have already said refers to contracts in general. As to the particular contract between master and servant the law is, if possible, yet more decided. The common law says that one who causes a breach of that contract is liable to damages. It has been said by some that action in such case lies only by reason of the Act of Parliament in the reign of Edward III, A. D. 1350, making the act of enticement of a servant from his employer wrongful. If so, we might hesitate in saying that it is actionable in West Virginia; but I assert, believing that I am supported by ample authority, that action is given in such case by the common law. So the text writers and courts treat it. In Comyms' Digest, Title Action on the Case A, p. 278, the common law rule is thus stated: "In all cases where a man has a temporal loss, or damage by the wrong of another, he may have an action upon the case to be repaired in damages." The Supreme Court of the United States, in *Angle* v. *Chicago Railway*, cited, stated the rule thus: "Wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce an injury, an action on the case will lie." It is generally treated as a common law cause of action. The general principle applicable to contracts in general would give action against a third party for wrongfully causing the breach of contract between master and servant; but as to this particular contract the law has been long settled. I cite the following authorities: "It is well settled that any person who, knowingly entices away the servant of another, and thereby induces him to violate his contract with his master, or who thereby deprives the master of the services of one then actually in his service, whether under a contract to serve or not, is liable to the master for his actual loss therefrom. But in this action it is necessary to prove not only that the person employed was in the service of the plaintiff, but also that the defendant *knowing* the fact, wrongfully induced him to leave it. The *intent* of the defendant, and the natural or actual effect of its execution, is the *gist* of the action, and, unless the declaration discloses that the act was done intentionally or willfully, and that it actually did, or was calculated to cause damage

to the plaintiff, and that it was done without right or justifiable cause, no recovery can be had. *Malice* is inferred from the wrongful character of the act, and the declaration or complaint must disclose such facts as support the inference. If a contract to serve is established, *actual service* under the contract need not be shown. *It is enough to show that the defendant, with notice of the servant's contract obligation to the plaintiff, has persuaded him not to enter into plaintiff's service under it.*" Wood Master and Servant, sections 230, 231. "The idea of interference with contract relations as to specific tort is of recent origin. The materials from which the generalization was worked out are found in several lines of precedents. From an early day it has been established that a master may maintain an action against one who entices away his servant or harbors and detains him with knowledge of his former contract." 16 Am. & Eng. Ency. L. (2d Ed.) 1109. "Certainly, since the statute of laborers, the common law has recognized the right of a master to recover for the actual damage he may have suffered by the wrongful interference by a third person with his relationship to his servant, by personal injury to the servant, or otherwise depriving the master, in whole or in part, of his service. * * * * Action for enticing servants from their employer, and for knowingly harboring servants who had previously left their employer, arose after the first statute of laborers. They survive its repeal, and occur in modern practice. Knowingly enticing from the service of another one who is employed under a contract not fully executed is an actionable wrong. Indeed, from this basis there has grown up a branch of law in which malice is an essential ingredient." Jaggard on Torts, section 155. "To the relation between *master* and *servant* and the rights accruing therefrom there are two species of injuries incident. The one is, retaining a man's hired servant before his time is expired; the other is, beating or confining him in such a manner that he is not able to perform his work. As to the first, the retaining another person's servant during the time he has agreed to serve his present master; this, as it is an ungentlemanlike, so it is also an illegal, act. For every master has by his contract purchased for a valuable consideration the service of his domestics for a limited time; the inveigling or hiring

his servant, which, induces a breach of this contract, is therefore an injury to the master; and for that injury the law has given him a remedy by a special action on the case; and he may also have an action against the servant for the non-performance of his agreement. But, if the new master was not apprized of the former contract, no action lies against *him*, unless he refuses to restore the servant, upon demand." Blackstone, Book 2, 142. I deem it useless to occupy space by quotation from other text books and decisions to prove the doctrine above stated. They all lay down the law to the same effect. 2 Kinkead on Torts, section 457; 3 Page on Contracts, sections 1326, 1327; 11 Am. St. R., 378, 474; Schouler on Domestic Relations, section 487; 83 Am. St. R., 289; *Bowen* v. *Hall*, 6 L. R. Q. B. D. 333; *Walker* v. *Cronin*, 107. Mass. 555; *Quinn* v. *Leathem*, App. Cases 1901, 495; *Taff Vale Co.* v. *Amalgamated Society*, App. Cases, 1901, 426. Hammon on Contracts, section 350, says: "The duty to respect the contractual tie so far as not to interfere with it rests upon all the world. Thus, it is everywhere agreed that it is an actionable wrong to entice away a man's servant from his employment. Independently of any right to sue the servant for breach of the contract of employment, the master may hold guilty the person liable in damages for thus wrongfully inducing the servant to sever the relation. Many courts, indeed, go further and lay down the broad principle that the man who unjustifiably induces one of two parties to a contract to break it, intending thereby to injure the other, or to obtain a benefit for himself, does that other a wrong, for which he must respond in damages."

The first count of the declaration alleges that the company is owner and operator of a coal mine, and was engaged on the 8th day of August, 1901, in the business of mining coal from the mine; that in order to carry on the business it was necessary for the plaintiff to employ, and it did employ, a large number of men to work in the mine, who were engaged in the company's service in working the mine and loading coal on railroad cars for shipment to parties with whom the plaintiff had contracts to furnish coal; that the defendants well knowing these facts, but contriving and wickedly and maliciously intending to injure the plaintiff in its business, unlawfully, wrongfully, maliciously, without justifiable cause,

without the consent and against the will of the plaintiff, molested, obstructed and hindered the plaintiff in its said business "by wilfully, wrongfully and maliciously persuading, inducing, enticing and procuring said servants of the plaintiff, employed as aforesaid, to absent themselves and depart from the plaintiff's service;" that on pretext and by reason of such persuasion, enticement and procuration the said servants on the date aforesaid, without license and against the will and consent of the plaintiff, wrongfully absented themselves and departed from said service, and continued to do so; that the plaintiff was unable to employ other servants to work in its mine in the place of the servants so enticed away, and was thereby prevented from prosecuting and carrying on its business as extensively and profitably as it could and would have done, had not its servants been induced and enticed by the defendants to quit its service.

The first count does not, in words, state an express contract for service between employer and employee. By the language used in the books a contract must exist. This count says the miners were "*employed*" by the plaintiff and in actual service. Now, if the law gives action for enticement of a servant, it is not conceivable that a third person can maliciously entice away a lot of employes, simply because there was no contract fixing term of service. The relation of master and servant exists. In such case there is a contract recognized by law, an implied contract by which the employee can recover for his service. By entering such service the employee agrees, contracts to work. It is no difference that he can quit when he pleases. In *Walker* v. *Cronin*, 107 Mass. 555, was such a count and the court held it good. *Frank* v. *Herold*, 63 N. J. Eq. 443, meets this objection. It says: "To make out the relation of master and servant, it is not necessary that there be any written, or even verbal, contract between the parties to work for any particular length of time, but the relation exists where one person is willing to work for another from day to day, and that other desires the labor and makes his business arrangements accordingly. Employers, where third parties interfere with their employes against the latter's consent, and endeavor by unlawful means to induce them to quit work, have a right to sue for relief." In *Chipley* v. *Atkinson*, 28 Fla. 206, 11 Am. St. R. 367, it was

held that an action for procuring discharge of a servant could be maintained though no time of service was fixed. The court said that so long as the servant chose to continue another person could not interfere, and "neither the fact that the term of service interrupted is not for a fixed period nor the fact that there is not a right of action against the person who is induced or influenced to terminate the service, or who refuses to perform his agreement, is, of itself a bar of action against a third person maliciously and wantonly procuring the termination of or a refusal to perform the agreement." In *Vegelahn* v. *Guntner*, 167 Mass. 92, 57 Am. St. R. 443, it is held unlawful to conspire to prevent employes from continuing in service though there is no fixed period of service. This count is interpreted as alleging a subsisting contract between the company and its servants in process of execution. Even where there is a full right of competition, where one party does an act hurtful to another, even though it be maliciously done, we held it to be justified and not actionable, except where it produced the breach of a contract. But we said that if there was a contract between a competitor and his customers in trade, any action by a third person causing a breach of that contract, between its parties, was wrongful action, and subject to an action for damages, even though it was done for the benefit of the interfering party in the lawful competition of trade. We held that the advancement of the interest of the third party for self-preservation in trade would not justify his causing one of the parties to that contract to break it. *Transportation Co.* v. *Oil Co.*, 50 W. Va. 611. A party cannot have a justifiable cause to instigate, to move, the breach of a contract between master and servant. We repeat that the law says that where there is such a contract and a third party causes its violation, he is liable to an action. We do not have to say whether if the interference is without malice it is actionable, since the declaration avers a knowledge by the defendant of the existence of the contract, and avers that they maliciously and wrongfully caused its breach. We do not deny the principle that a man may do an act damaging another, even maliciously, when he has legal excuse or justification therefor; but we say that when his action, with knowledge on his part of a contract, causes, by intention, a breach of that contract, he is liable to damages

even though he acts for the promotion of his own interest. But in the present case the declaration avers that the defendants had no justification. It does not intimate that their action was moved by a purpose to benefit their own business, their own trade, their own interest in any shape. On the contrary it avers that their action was characterized by a wilful intent to injure the plaintiff without justifiable cause. If they had justifiable cause for their action the declaration does not speak it, and we are governed, on demurrer, by the declaration. Therefore, we hold that the first count of the declaration states a cause of action. We, however, say that it is defective in not specifying the servants who were enticed.

The second count alleges that the plaintiff to secure miners from other states made special written contracts with certain miners, to-wit: "William Linder and eight others, residents of North Carolina, whereby these miners agree to come to plaintiff and enter into service and engage in digging and shipping coal from its mine at a certain fixed rate per ton," specifying the rate, and that the company paid their fares of $11.50 each from North Carolina to the mine under contract with the miners that the fares were to be repaid the plaintiff out of the wages earned by the miners in mining for the plaintiff; that on the arrival near the mine the defendants, knowing of such contract, wrongfully, maliciously and with unlawful purpose to injure the business of the plaintiff and against the consent of the plaintiff, induced and enticed said miners to break their several contracts of service and refuse to enter the service of the plaintiff according to the written contract, and persuaded and induced and enticed them to depart, and that by reason of said persuasion and enticement said miners, engaged under said written contract, wholly failed and refused to perform their contracts and enter the service of the plaintiff, and immediately departed from the place where they were employed to work without having entered the service of the plaintiff and without having paid the plaintiff the money advanced for said railroad fare, and that none of the miners have returned to work in the said mine. Under the principles stated above this count shows a good cause of action.

A third count alleges that the plaintiff being such operator of a coal mine made a written contract with Samuel Bowean where-

by Bowean contracted to mine for the plaintiff five hundred tons of coal, and Boween had entered upon the performance of the contract, and that the defendants knowing of such contract, unlawfully, wrongfully, maliciously and with unlawful purpose to injure the business of the plaintiff, induced and enticed Bowean to break and disregard the contract, and that Bowean, by reason of such enticement, broke and refused to execute the contract. Under principles above stated this count shows a good cause of action.

A fourth count says that the plaintiff, being owner and operator of such coal mine, made special written contracts with Alvin Hunter and other persons named, whereby each one of them obligated himself to mine for the plaintiff a certain fixed amount of coal at a specified rate per ton; that said Hunter and others had actually started upon the performance of their contracts, that the defendants well knowing thereof, contriving and falsely and maliciously intending to injure, vex, harass, oppress, impoverish and wholly ruin the plaintiff in its business, unlawfully and maliciously did agree, confederate, combine and form themselves into a conspiracy to persuade, entice and procure Hunter and others named to violate, break and wholly disregard their contracts with the plaintiff; that the defendants having so conspired and confederated under the name of the "United Mine Workers of America," contriving and intending as aforesaid, in pursuance and execution of their conspiracy, on a day named, unlawfully, wantonly, wrongfully and maliciously, without justifiable cause, and against the will of the plaintiff, molested, obstructed and hindered the plaintiff in its business of mining and shipping coal by wilfully, wantonly, wrongfully and maliciously persuading, enticing and procuring Hunter and the others named to break, violate and disregard their contracts, and that on pretext and because of such persuasion, Hunter and others, against the will, and without the consent of the plaintiff, without cause, violated their contracts by refusing to continue their work of mining coal as required by their contracts, and have not performed their contracts. Under principles above stated this Count shows a good cause of action. *Employing Club* v. *Doctor Blosser Co.*, 50 S. E. 353.

The defendants rely on Code of 1899, p. 1053, section 14,

reading as follows: "Nor shall any person or persons or combination of persons by force, threats, menace or intimidation of any kind, prevent or attempt to prevent from working in or about any mine, any person or persons who have the lawful right to work in or about the same, and who desire so to work; but this provision shall not be so construed as to prevent any two or more persons from associating themselves together under the name of Knights of Labor, or any other name they may desire, for any lawful purpose, or from using moral suasion or lawful argument, to induce any one not to work on and about any mine." This statute is a penal, criminal statute; for it makes the acts in it specified unlawful, and by section 17 imposes a punishment. This is a criminal act. It does not pretend to create rights between individuals. It prohibits certain acts, and the proviso simply curtails the scope of the enactment by saying that the enacting clause shall not be construed to impair any right, already existing, if existing, to join the organization therein specified or use moral suasion. It is only a curb upon the enactment. It does not affirmatively grant, create or originate those rights. It does not make them lawful, if before unlawful. And could the Legislature authorize any person to violate a contract?

We, therefore, reverse the judgment, overrule the demurrer, except as to the first count, and remand the case to the circuit court for further proceedings, with leave to amend the first count of the declaration.

Reversed.

CHARLESTON.

STATE v. LOWE.

Submitted January 16, 1906. Decided March 6, 1906.

1. TAXATION—*Sale by State—Redemption—Contest.*

In a suit by the State to sell land as forfeited in the name of a certain owner, if another adverse claimant resists redemption asked by the owner of the forfeited land, on the ground that it is

within his land, held under an older grant from the State, the burden of proof rests on such contestant of redemption to prove that the land of the person asking redemption lies within the bounds of his land. (p. 264.)

Appeal from Circuit Court, Wayne County.

Bill by the State against Mary C. Lowe and others. Decree for the State and E. W. Clark and others appeal.

Affirmed.

VINSON & THOMPSON, for appellants.

CAMPBELL, HEFFLEY & DAVIS and WILLIAM FRY, for the the State.

BRANNON, JUDGE:

The State filed a bill in the circuit court of Wayne county for the sale of a tract of 500 acres of land conveyed to M. J. Ferguson as forfeited for non-entry on the tax books, stating that the tract was claimed by the Guyandotte Coal Land Association, and claimed also by William Fry. Clark and others as trustees for said association filed an answer denying forfeiture of the tract, and setting up title to it. The trustees claimed the 500 acres as included in a tract of 31,000 acres, patented to Samuel Smith, 29th of June, 1797 which vested in said trustees by regular chain of conveyances from said patentee. William Fry filed a petition asserting that the 500 acres was granted by Virginia, by patent, 1st August, 1857, to Milton J. Ferguson and Hurston Spurlock, and that he was the owner by regular chain of conveyances from the patentees, and admitting forfeiture of the 500 acres, and praying to be allowed to redeem the land from such forfeiture. The grant to Smith was an inclusive grant, that is, there was included within its exterior bounds, and excepted from its operation, 24,502 acres in addition to the 31,000 acres. A decree was entered allowing Fry to redeem, from which the trustees appeal.

The question is whether Fry showed a good title to redeem under that clause of section 16, chapter 105, Code, demanding of a redeemer full and satisfactory proof that "at the time the title to said land vested in the state the said former owner had a good and valid title thereto, legal or equitable, superior to any other claimant thereof." *State* v. *Jackson*,

56 W. Va. (point 7), p. 558. The trustees resist redemption of the Fry land by saying that the Fry land is covered by the Smith grant, the elder grant, and that Fry has not good title. On which side of this contest between Fry and the trustees lies the burden of proof? Must Fry prove that his tract does not lie inside the Smith grant? Or must the trustees prove, that Fry's tract lies inside the Smith grant? Fry having shown title from the State, admitted, as an agreed fact, to be a title superior to any other, if it does not lie inside the older Smith grant, has shown right to redeem, unless his land is covered by the Smith grant. The trustees resist this redemption. They must defeat this right of redemption. If their right does not defeat redemption, it must be granted. We hold that the trustees must locate both the Smith grant and the Fry land, as without so doing it cannot be found that the Smith grant covers the Fry land. If the contest were between the State and the trustees; if the trustees were resisting the sale of the 500 acres as forfeited land because they had the better title, they must show it by proving that their title covers the 500 acres. It is the same title which the state seeks to sell that Fry seeks to redeem, and thus it seems that the trustees, to defeat redemption, must prove what they would have to prove to defeat a sale. If the trustees were suing Fry in ejectment, they would have to show that his land lies within their grant. The trustees are resistants of redemption. Can they resist this plain right without showing cause against it? They argue that the statute demands that Fry show valid title in order to redeem; that he asserts good title, and holds the affirmative position. The answer is, that Fry has shown a grant from the fountain of title, the state, clearly good unless a better one is shown. Besides, it is an agreed fact that this grant confers a title superior to any other, unless it is included in the Smith grant. He who would defeat the right of redemption must show that Fry's land does lie within the Smith grant.

The burden thus resting on the trustees to identify and locate both tracts, they have utterly failed to do so. They prove not one corner monument of the Smith survey or line monument. Not a tree, corner or line tree, is proven as

belonging to the survey. Not a witness says that he ever tested or even looked upon a tree marking this old survey. Not a word from the lips of an old man, living or dead, who saw or knew of any corner or line tree, or other monument is proven. No tree or monument is shown to bear a reputation as a corner to the survey. No word from any one having peculiar means of knowledge, or interest in knowing the boundary, is shown. Not even hearsay is proven. Two witnesses say the 500 acres lies within the Smith grant; but when cross-examined they so understand from some maps, modern ones, made by the trustees showing what lands they held or claimed, for the purpose of taxation. Of course, they were not admissible, because self-serving and hearsay, and for other reasons. When the witnesses referred to were asked whether they, of their personal knowledge, knew the 500 acres to be within the land claimed by the trustees, they answered "No." In short, the only two witnesses of the trustees do not pretend to know, as a matter of fact, the location of the old survey of Smith. The same may be said as to the 500 acres. There is a total failure to locate the tracts. This location is a necessity. He who sues for land must locate its bounds on the ground. *Logan* v. *Ward*, (52 S. E. 398,) 58 W. Va. 366. This ends the case. It is useless to discuss the question whether, if the 500 acre tract were shown to be inside the exterior bounds of the Smith grant, the burden would lie on Fry or the trustees to prove that it is, or is not, within the land excluded by the Smith grant for prior claims.

We, therefore, affirm the decree allowing the redemption to have such force as the law gives it.

Affirmed.

CHARLESTON.

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DYE v. CORBIN.

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Submitted January 30, 1906. Decided March 13, 1906.

1. TRIAL---*Striking Out Evidence.*

A motion to exclude all the plaintiff's evidence introduced upon the trial of an action should be sustained, when such evidence is insufficient to sustain a verdict in favor of the plaintiff, notwithstanding there is a scintilla of evidence supporting the plaintiff's case. (p. 267.)

2. PHYSICIANS AND SURGEONS—*Malpractice—Burden of Proof.*

In an action for damages against a physician, for negligence and want of skill in the treatment of an injury or disease, the burden is on the plaintiff to prove such negligence or want of skill, resulting in injury to the plaintiff. (p. 270.)

3. SAME---*Degree of Skill Required.*

A physician is not required to exercise the highest degree of skill and diligence possible, in the treatment of an injury or disease, unless he has by special contract agreed to do so. In the absence of such special contract, he is only required to exercise such reasonable and ordinary skill and diligence as are ordinarily exercised by the average of the members of the profession in good standing, in similar localities and in the same general line of practice, regard being had to the state of medical science at the time. (p. 273.)

4. SAME.

A physician does not warrant or insure that his treatment will be successful, in the absence of special contract to that effect. (p. 270.)

5. SAME---*Failure to Cure.*

Failure on the part of a physician to effect a cure does not, alone, establish, or raise a presumption of, want of skill, or negligence, on his part. (p. 273.)

6. SAME---*Mistake in Judgmeat.*

Where a physician exercises ordinary skill and diligence, keeping within recognized and approved methods, he is not liable for the result of a mere mistake of judgment. (p. 273.)

7. SAME.

A physician is liable for the result of an error of judgment, where such error is so gross as to be inconsistent with that degree of skill which it is the duty of a physician to possess. (p. 273.)

Error to Circuit Court, Ritchie County.

Action by T. E. Dye against M. L. Corbin. Judgment for defendant, and plaintiff brings error.

Affirmed.

DUTY & FIDLER, for plaintiff in error.

FREER & ROBINSON, for defendant in error.

COX, JUDGE:

On the 14th day of January, 1903, in the circuit court of Ritchie county, T. E. Dye instituted an action of trespass on the case for $10,000 damages against M. L. Corbin, a practicing physician of that county, for malpractice in the diagnosis and treatment of an injured ankle. Upon trial before a jury, and after the plaintiff had introduced all of his evidence, the defendant, without introducing any evidence, moved the court to exclude plaintiff's evidence, which motion being sustained, a verdict for defendant followed. Plaintiff moved to set aside the verdict, which motion was overruled, and judgment entered for defendant. The proper exceptions to the rulings of the court being taken, plaintiff was allowed a writ of error by a judge of this Court.

The assignments of error relate to, and are based upon, the action of the court in sustaining the motion to exclude plaintiff's evidence. The court should have sustained the motion to exclude plaintiff's evidence, if that evidence was insufficient to sustain a verdict in his favor. If it ever was the law that the court should not sustain a motion to exclude plaintiff's evidence, or to exclude plaintiff's evidence and direct a verdict for defendant, when there is only a scintilla of evidence to support plaintiff's case, it is no longer the law in this State. The test is not whether there is a scintilla of evidence to support the plaintiff's case, but whether the evidence will sustain a verdict in his favor. The plaintiff must show a *prima facie* case. This is the only reasonable rule. The utter futility of requiring a court to overrule a motion to exclude plaintiff's evidence where that evidence is insufficient to support a verdict, notwithstanding there is a scintilla of evidence supporting the plaintiff's case, is apparent. Why compel the trial to proceed when in no event can the plaintiff finally recover? It is useless to continue a trial when there is nothing to try, and to compel a defense when there is nothing against which to defend. For these reasons, our later cases hold that a motion to exclude plaintiff's evidence should be sustained when that evidence is insufficient to support a verdict in his favor. *Ketterman* v. *Dry Fork R. R. Co.*, 48 W. Va. 606;

Cobb v. *Glenn Boom & Lumber Co.*, 57 W. Va. 49, (49 S.E. 1005); *Williamson & Co.* v. *Nigh et al.*, decided at this term and not yet reported.

This being the rule, was the evidence offered by plaintiff sufficient to sustain a verdict in his favor?

Plaintiff offered evidence tending to prove, among other things, the following: Plaintiff received an injury to his left ankle on the 31st of August, 1902, by being thrown from a horse about two miles from Ellenboro in Ritchie county. After receiving the injury, he was carried to the house of Mullenax, where a large number of persons gathered. The defendant, a practicing physician and the family physician of plaintiff, was sent for, and after some time came and examined the plaintiff's injury. At the time of the examination, the ankle was considerably swollen. The plaintiff said that he thought it was broken. The defendant after examination said it was dislocated, but not broken. Plaintiff requested the defendant to procure another physician, and to administer an anaesthetic. The defendant advised against the employment of another physician, and did not administer an anaesthetic. He procured cotton and splints made from pasteboard, and bandaged the injured ankle. By his direction, persons present assisted him by holding the patient while the ankle was being bandaged. After the plaintiff had been thus treated, he was carried to his home, a short distance. On the next day, the defendant visited the plaintiff and treated the injury. On the second day, the defendant treated the injury, the pasteboard splints being replaced by a tin splint or tin boot leg. The defendant continued the treatment until the sixth or seventh day after the injury, when he removed the tin splint and placed the injured limb in a cast made of plaster of Paris, after which he told the plaintiff that he might get out of bed and go wherever he pleased, Some time after the cast was placed on the injured limb, plaintiff complained of pain. The defendant, being called, opened the cast by cutting a groove in it, again adjusted it to the limb, and put another cast over the old one. Between ten days and three weeks (the time is not shown with certainty) after the injury, plaintiff began to go about by the use of crutches. After he began to go about, he accidentally fell twice, but he claims without hurt to the injured ankle. About the 26th of Sep-

tember, 1902, he went to Parkersburg, some distance from his home, and about that time and afterward went to various other places, and did other acts which are claimed by defendant to constitute contributory negligence on the part of the plaintiff. In our view of the case, it is unnecessary to detail those acts claimed to show contributory negligence.

About ten weeks after the cast was placed on the injured limb, plaintiff went to Parkersburg to consult a physician, and while waiting for the physician to return to his office plaintiff cut off the cast. When the cast was removed, the heel of the foot seemed to be turned inward, and the fore part of the foot had dropped downward. On the 6th of January, 1903, plaintiff went to Cincinnati, Ohio, for treatment by Drs. J. R. and S. H. Spencer, practicing physicians in that city. They made a number of radiographs of the injured limb, and found the following condition, as testified to by Dr. S. H. Spencer: "He had a fracture of the fibula of the left ankle joint. There was a dislocation, and in connection with this fracture and dislocation it threw the joint inward, and the foot turned inward. The dislocation was inward, and the foot turned inward, and the fibula was broken above the external malleolus, and the lower end of the bone was turned backwards; or, in other words, the head of the fibula broken off and was turned backwards. There was an oseous deposit thrown out in and around the head of this bone, which had cemented, as it were, the foot and ankle joint. Because of this anchylosis there was a stiffening of the ankle joint." After returning from Cincinnati, the plaintiff consulted Dr. Cunningham, of Marietta, Ohio, and was treated by him, which treatment resulted in the amputation of the foot about six or seven inches above the ankle. The amputation occurred on the 17th of October, 1904.

For the present, we may eliminate from consideration the question of contributory negligence; and first determine whether or not the plaintiff has made a *prima facie* case, excluding that question.

Plaintiff claims that the evidence in this case shows a liability on the defendant for failure to correctly diagnose the injury, and for failure to properly treat the injury. The declaration charges that the defendant, having accepted the employment of physician for the treatment of the plaintiff, "so

unskillfully and negligently conducted himself in that behalf that, by his want of skill and care, the injury of plaintiff became greatly increased and aggravated," etc. This essential averment must be sustained by proof. Before we can determine the sufficiency of the evidence to sustain this averment, we must ascertain the degree of skill and diligence which the law required of the defendant under the circumstances of this case. There was no special contract on the part of the defendant as to the result of his treatment. The employment was general. The defendant was simply called to treat the plaintiff's injury, and accepted the employment. Our previous cases, *Kuhn* v. *Brownfield*, 34 W. Va. 252, and *Lawson* v. *Conaway*, 37 W. Va. 159, are in point. In the latter case, it was held that a physician was bound to bestow such reasonable and ordinary care, skill and diligence as physicians and surgeons in the same general line of practice ordinarily have and exercise in like cases, time and locality being taken into consideration; and that a physician is bound to exercise the average degree of skill possessed by the profession in such locality. This holding is in accord with the great weight of authority. We think it may be said to be the generally accepted doctrine that a physician is not required to exercise the highest degree of skill and diligence possible, in the treatment of an injury or disease, unless he has by special contract agreed to do so. In the absence of such special contract, he is only required to exercise such reasonable and ordinary skill and diligence as are ordinarily possessed and exercised by the average of the members of the profession in good standing, in similar localities and in the same general line of practice, regard being had to the state of medical science at the time. 22 Am. & Eng. Enc. Law 799; Current Law, Vol. 4 p. 638; 3 Wharton & Stille's Med. Juris. (5th Ed.) §§ 473-475; *Gramm* v. *Boener*, 56 Ind. 497; *Whitesell* v. *Hill*, 66 N. W. Rep. (Ia.) 894; *Small* v. *Howard*, 128 Mass. 131; *Haythorne* v. *Richmond*, 48 Vt. 557; *Pelky* v. *Bailey*, 109 Mich. 561; note to *Gillette* v. *Tucker*, 93 Am. St. Rep. 657.

The general rule stated does not make the physician in any sense the warrantor or insurer of the success of his treatment, in the absence of special contract to that effect. *Law-*

son v. *Conaway*, *supra*; *Kuhn* v. *Brownfield*, *supra*; 22 Am. & Eng. Enc. Law 800.

The evidence of the Cincinnati physicians, S. H. and J. R. Spencer, who made radiographs of the injured limb, was offered to show want of skill and diligence on the part of the defendant. Dr. S. H. Spencer testified as follows:

"Q. Was this injury of the character that it could have been possible, by proper medical skill, to have reduced it so as to have left the limb in a better condition than it was left in?

A. Yes, sir, that was my judgment.

Q. Suppose a patient had sustained an injury of the ankle joint, so as to have the fibula broken and turned backward, together with a dislocation of the ankle joint, in the manner and character as the one you have described; and suppose that the attending surgeon should undertake to reduce that fracture and dislocation without administering an anaesthetic to the patient, by having him held by physical force while he undertook to reduce the limb, and with no more effect than the one you have examined on the plaintiff; what in your judgment, as a physician and surgeon, would you consider this treatment good or bad?

A. I would consider it bad treatment."

Dr. J. R. Spencer testified as follows:

"Q. Suppose an injury sustained by any one of the kind and character that you find by examination of Mr. Dye's ankle, and it was treated by the attending surgeon without the administration of an anaesthetic to the patient, and by causing him to be held during the manipulation by physical force, whether or not it would have been good treatment?

A. I think it was not the proper way to proceed."

The foregoing is not all the evidence of the two physicians named, but the part quoted will serve to show the character of all of it. It must be borne in mind that these physicians did not see the plaintiff until more than four months after the injury. Neither the physician who was consulted by the plaintiff in Parkersburg, nor the physician who had amputated the foot, was called upon to testify for plaintiff. Taking the evidence of the Cincinnati physicians as true, and giving full force and effect to it and to every legitimate inference that may be drawn from it, we are unable to reach

the conclusion that it shows such negligence or want of skill on the part of the defendant, considering the locality where, and the circumstances under which, the treatment was given, as would make the defendant liable. Of what standard of proper medical skill or bad treatment do these physicians speak? As we have seen, the law does not in any case, without special contract, require the highest degree of skill and diligence possible. We are left to conjecture by what standard these physicians estimated proper medical skill or bad treatment. If these physicians meant the standard existing in Cincinnati, a large city, where they no doubt were familiar with the practice, then such standard fixes no liability on the defendant; because he was not bound by the standard prevailing in Cincinnati, but by the standard prevailing in the locality where the treatment was given, or in like localities. The evidence of these physicians seems be be directed particularly to the failure of the defendant to give an anaesthetic. It will be observed that these physicians do not say that the failure to give an anaesthetic produced a bad result on the injured ankle; or that the treatment of the ankle was improper. The treatment may have been attended with more pain to the patient because an anaesthetic was not administered, but the treatment of the ankle may have been the same, whether with or without an anaesthetic. It does not follow that the injury to the ankle was increased or aggravated by failure to give an anaesthetic. There is no evidence that the injury to the ankle was increased or aggravated by such failure. Such increased or aggravated injury to the ankle cannot be presumed without evidence.

Again, it is not shown that, under the standard of skill and diligence by which the defendant was bound, it was his duty to administer an anaesthetic, considering time, locality and the condition of the patient. The questions propounded to these physicians included none of these conditions which existed when the treatment was given by the defendant. The answers, being responsive to the questions, cannot be taken to include more than the questions. This being true, we are left without any opinion from these physicians as to whether the treatment given by the defendant, under the conditions existing when it was given, was proper or improper. There is absolutely no evidence showing what the proper treatment

for the injured ankle was, at the time and under the conditions existing when the defendant gave the treatment. To hold the defendant liable under the evidence of these physicians would be to do so upon mere conjecture, without any satisfactory proof. Proof showing mere conjectural possibility that unfavorable results were due to want of care or skill, is not sufficient to make a physician liable. 3 Wharton & Stille's Med. Juris. § 517.

It may be claimed that the evidence of the plaintiff discloses failure of defendant's treatment to cure the injured ankle, and also error or mistake in diagnosis. Failure on the part of a physician to affect a cure does not, alone, establish, or raise a presumption of, want of skill, or negligence, on his part. *Lawson* v. *Conaway*, *supra;* 3 Wharton & Stille's Med. Juris. § 517; *Wohlert* v. *Seibert*, 23 Pa. Sup. Ct. 213; *Haire* v. *Reese*, 7 Phila. 138; *Pettigrew* v. *Lewis*, 46 Kan. 78; *Barney* v. *Pinkham*, 29 Neb. 350; *Craig* v. *Chambers*, 41 Ohio St. 253; *Sims* v. *Parker*, 41 Ill. App. 284.

It has also been held that the fact that a physician fails to discover a fracture or dislocation does not, alone, establish, or raise a presumption of, want of care on his part. 3 Wharton & Stille's Med. Juris. § 517; *Richards* v. *Willard*, 176 Pa. 181; *James* v. *Crockett*, 34 N. B. 540.

Where a physician exercises ordinary care and skill, keeping within recognized and approved methods, he is not liable for the result of a mere mistake of judgment. A physician is liable for the result of error of judgment, where the error is so gross as to be inconsistent with that degree of skill which it is the duty of a physician to possess. 3 Wharton & Stille's Med. Juris. § 501; *West* v. *Martin*, 31 Mo. 375; *Johnson* v. *Winson*, 94 N. W. (Neb.) 607; 22 Am. & Eng. Enc. Law 805, and cases cited in Note 1.

We find no evidence of gross error of judgment; no evidence as to what the proper treatment was under the conditions existing when the defendant treated the plaintiff; no evidence that the treatment given was improper, considering time, locality and conditions.

We therefore hold that the plaintiff's evidence was insufficient to sustain a verdict in his favor. The judgment of the circuit court must be affirmed.

Affirmed.

CHARLESTON

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DENT v. PICKENS, *et al.*

Submitted February 27, 1906. Decided March 13, 1906.

1. APPEAL---*Decision.*

In determining whether a matter is *res judicata* by a decision of an appellate court, when the order entered reverses a decree of the trial court, and remands the cause for further proceedings, according to directions given in the written opinion, filed at the time of the rendition of the decision, the opinion and record, as well as the order, are to be considered; and, if it appears, from the record, that the parties between whom it is claimed there was an adjudication, were before the court, and the subject matter of the alleged adjudication brought into the suit, by pleadings relating thereto, and, from the opinion and order, that the matter was expressly decided, the parties are concluded by the decision in all further proceedings in the cause in the court below, as well as in all collateral proceedings, although the pleadings in the cause, viewed from the standpoint of a demurrant thereto, were insufficient. (p. 281.)

2. SAME---*Extent of Decision.*

Not only all matters that were actually litigated, but also all others that the parties were bound, by the state of the pleadings, to assert, by way of defense to, or in support of, the demand or demands set up in a cause, are *res judicata* by the decision rendered therein. (p. 285.)

3. JUDGMENT---*Res Judicata---Parties---Lis Pendens.*

Except in pure proceedings *in rem* nothing is *res judicata* by a decision as to persons who are not parties to the cause in which it was rendered; but the status of the property involved therein may have been so affected, by the pendency of the suit, as to have rendered it insusceptible of valid purchase or acquisition by strangers thereto, while the cause was pending or after decision, as against one who was a party to it. (p. 286.)

4. *Lis Pendens---Extent of Rule.*

The rule *lis pendens* extends to non-negotiable choses in action and funds, for the subjection of which to the payment of a debt, a suit in equity has been instituted to set aside assignments thereof, as having been made in fraud of the plaintiff's rights. (p. 284.)

5. FRAUDULENT CONVEYANCE---*Assignment of Fund---Answer.*

The answer of an assignee to a bill, attacking an assignment of a fund, as having been fraudulently made, must deny notice of fraudulent intent of the assignor, as well as fraudulent intent on the part of the assignee. Failure to deny it is equivalent, in legal effect, to an admission of the truth of the allegation of notice. (p. 289.)

6. SAME—*General Denial—Effect.*

The answer of an assignee, responding to a bill charging fraud in the assignment, specifically denies the fraudulent intent imputed to him by the allegations of the bill, says nothing as to the fraudulent intent imputed to his assignor, is silent as to the allegation of notice of the fraud of the latter, and denies generally each and every charge or intimation of fraud charged against respondent in plaintiff's original and amended bills; and there is no exception to said answer. *Held*, the general denial is insufficient to negative fraudulent intent of the assignor and notice thereof to the assignee. (p. 289.)

7. SAME—*Bona Fide Purchaser.*

One who claims title to property or a fund as a *bona fide* purchaser without notice must allege, not only that he is a purchaser for value, but also that he had no notice of the fraudulent intent of his vendor or his assignor. It requires both payment of adequate consideration and want of notice of fraud to make out a title in such case. (p. 290.)

Appeal from Circuit Court, Barbour County.

Suit by Susan C. Dent against Dever Pickens and others. Decree for plaintiff, and defendants A. G. Dayton and others appeal.

Affirmed in part. Reversed in part.

FRED O. BLUE and DAVIS & DAVIS, for appellants.

J. HOP WOODS, for appellee.

POFFENBARGER, JUDGE:

On the 12th day of May, 1905, in the chancery cause of Susan C. Dent v. Dever Pickens and others, pending in the circuit court of Barbour county, an order allowing an appeal in the following terms was entered by this Court: "An appeal and *supersedeas* upon the foregoing petition is allowed as to so much of the decree pronounced on the 23rd day of February, 1905, as requires that A. G. Dayton and Mollie Pickens pay to the plaintiff the sum of $1,000.00, with interest thereon from the 12th day of May, 1892, and the sum of $69.24, with interest thereon from the 6th day of June, 1892, and that said A. G. Dayton and John J. Davis pay to the plaintiff the sum of $125.00, with interest thereon from the 21st day of May, 1892, and that said A. G. Dayton and John Bassel pay to the plaintiff the sum of $150.00, with interest thereon from the 26th day of May, 1892."

The decree contains a number of other adjudications in favor of the plaintiff, some of which, not covered by the

order allowing the appeal, are made the subjects of assignments of error in the briefs of counsel. They say that, as the case is before this Court on an appeal, they may, under the rules, assign any error in the decree. We do not understand this to be in accord with the practice of this Court or its rules, as properly construed. When the appeal is from the whole decree, errors in it, not assigned in the petition for the appeal, may be assigned in the briefs, and may even be noticed by the Court and acted upon without any assignment thereof. But when the appeal allowed does not extend to the whole decree, the Court has before it, and within its jurisdiction, only those matters as to which the appeal was allowed. All adjudications as to which no appeal was allowed remain in the court below, within its jurisdiction, and constitute proper subjects for its further action. A proposition so obviously deducible from the terms of the order requires no citation of authority for its support; but, as the contrary thereof seems to be relied upon with confidence, reference is here made to 3 Cyc. 220, where a number of decisions in which the rule has been enforced are cited. The only exception, is a case in which the matter, as to which the appeal was allowed, is so connected with all others as to render it impossible to act upon it without affecting them. At this time, therefore, none of the matters adjudicated in the decree of February 23, 1905, except the two items of $1,000.00 and $69.24, decreed against A. G. Dayton and Mollie Pickens, the $125.00 item, decreed against A. G. Dayton and John J. Davis, and the $150.00 item, decreed against A. G. Dayton and John Bassel, are within the jurisdiction of this Court, nor can they be considered on this appeal.

As to these items, appellee relies upon the principle of *res judicata*, claiming that this Court, by its decision and directions to the court below, on the first appeal in this cause, the disposition of which is reported in 46 W. Va., at page 378, adjudicated and settled the controversy in reference thereto in her favor. If this be true, there is no error in the action of the court below in allowing them to her, for that decision, whether it be right or wrong, is unalterable. *Butler* v. *Thompson*, 52 W. Va. 311; *Koontz* v. *Doolittle*, 48 W. Va. 592; *Camden* v. *Werninger*, 7 W. Va. 528; *Henry* v. *Davis*, 13 W. Va. 230; *Campbell* v. *Campbell*, 22 Grat. 649; *Bank*

v. *Craig*, 6 Leigh 399; *Sibbald* v. *United States*, 12 Pet. 448; *Mackall* v. *Richard*, 116 U. S. 45; *The Santa Maria*, 10 Wheat. 431; *Himely* v. *Rose*, 5 Cranch 313. The first important inquiry, therefore, is whether this Court decided anything respecting said items, and if so, what.

Before entering upon this inquiry, it is proper, and necessary to a clear analysis of the decision rendered by this Court, to mark a distinction as to parties. A. G. Dayton, John Bassel and John J. Davis were not parties to this cause at the time of said decision. Bassel was not a party at all in any capacity. Dayton and Davis were parties as trustees and Dayton as special commissioner. Mollie Pickens and Dever Pickens were parties, and the litigation, as to one of the matters now under consideration, the Coburn debt, less the part assigned to Mollie Pickens, was between Susan C. Dent on the one side and Dever Pickens and Minnie B. Coburn on the other side, and, as to said assigned part, between Susan C. Dent and Mollie Pickens, Dayton and Davis being rather nominal parties in their representative capacities. Hence, whatever decision was rendered affected personally Dever Pickens, Minnie B. Coburn and Mollie Pickens, and the status of the funds about which they were litigating. No personal decree could have been rendered against Dayton, Davis and Bassel, but the status of the fund may have been so affected as to have rendered the subsequent decree against them proper on the third amended bill afterwards filed against them along with the original parties.

Susan C. Dent, in the year 1889, instituted an action at law against Dever Pickens, laying her damage in the declaration at $25,000.00. Pending the same, and before judgment, the defendant executed a deed of trust, conveying to A. G. Dayton and John J. Davis, trustees, certain real estate to secure the payment of alleged indebtedness, amounting, in the aggregate, to $11,000.00. Her original bill in this cause, filed in February, 1889, set up the pendency of said action and attacked the said deed of trust as fraudulent and prayed that it be set aside as to her demand. In September, 1889, she filed an amended bill, showing the recovery of a judgment by her in said action for the sum of $10,000.00 and the issuance of

execution thereon and docketing of the same in the clerk's office of the county court of said county, whereby she claimed to have acquired a lien upon all the personal property and estate of said defendant. In this amended bill, she further charged that, on the 10th day of May, 1889, the defendant, for the purpose of hindering, delaying and defrauding her out of the collection of her said debt, had entered into a marriage contract with Minnie B. Coburn and fraudulently settled upon her, by assignment, a large amount of personal property in the form of debts due him from sundry persons, and conveyed to her his interest in a certain tract of land, containing 396¾ acres. Among the debts so assigned there was one which is described in said contract as follows: "The rest and residue of the debt due said Dever Pickens from M. W. and Ledrue Coburn, and secured by deed of trust to Alston G. Dayton and James Pickens, trustees, dated December 21st, 1885, after deducting therefrom $1,000.00, assigned Jan'y 14th, 1880, to Mollie Pickens." The marriage contract, containing this assignment and recital, was exhibited with said amended bill. The following allegations of the amended bill relate, in part, to said Coburn debt and the assignment of a portion thereof to Mollie Pickens: "Plaintiff further says that on the 31st day of August, 1889, she caused an execution to be issued upon said judgment, and on the 31st of August, 1889, had the same placed in the hands of the sheriff of said county to be executed, and on the 31st day of August, 1889, had the same docketed in the clerk's office of the county court of said county, and thereby acquired and continued the lien of said execution upon the debts transferred by said defendant Pickens to said Minnie B. Coburn, whereof the said M. W. Coburn, Ledrue Coburn, A. G. Dayton, surviving trustees of himself and said James Pickens, deceased, in the deed of trust dated December 21st, 1885, mentioned in said contract, Mollie Pickens, A. S. Pickens, M. S. Clevenger, A. H. Young, Emma Walker and John D. Pickens, in his own right, have due notice and had also knowledge of the fraudulent purpose of said defendant Pickens in making said contract."

"Plaintiff further avers that since she filed her said original bill the said Dever Pickens has abandoned this state and is living in one of the far western states, as does also the

said Minnie B. Coburn, who is the daughter of said M. W. Coburn and the niece of said Ledrue Coburn, both of whom are insolvent; that the said Dayton and Davis are and were the counsel of said Dever Pickens from the day of the institution of plaintiff's action at law against him in which said judgment was recovered up to this day; that said Mollie Pickens, Emma Pickens and John D. Pickens are the sisters and brothers of said Dever Pickens; that said A. S. Pickens is his nephew; that said A. H. Young is the husband of his sister, and that said M. S. Clevenger is either some relative or intimate friend of said Dever Pickens; and that all of them well knew the financial standing and habits of said Pickens and of his purpose to cheat the plaintiff in all of said transfers." Said first amended bill further alleged that Dever Pickens, "for the purpose of hindering, delaying and defrauding the plaintiff out of the collection of her said debt, entered into a marriage contract or ante-nuptial settlement with the defendant, Minnie B. Coburn, a person without financial means or worldly position, justifying the generosity of said Pickens, whereby, in consideration of the promise of said Coburn to marry said Pickens, he transferred and set over to her certain debts due to him," amounting in the aggregate to more than $3,500.00; and that the said contract was void in law and fraudulent in fact and that the said Minnie B. Coburn was privy to, and had perfect knowledge of, the fraudulent purpose of said Pickens in executing the same.

A second amended bill was filed in 1893, which contains the following allegations respecting said sum of $1,000.00 and the Coburn debt: "Plaintiff further says that the said Dever Pickens is insolvent; that the deed of trust executed by him to the defendants, Davis and Dayton; trustees, on the 14th day of January, 1889, and the said contract, are fraudulent for the reason set up in her former original and amended bills; that the defendants, Mollie Pickens, A. S. Pickens, M. S. Clevenger, A. H. Young, Emma Walker and John D. Pickens, both as executor and in his own right, had due notice thereof; that the debts due from them and from the defendants, M. W. Coburn and Ledrue Coburn, to said Dever Pickens mentioned in said trust and contract remain unpaid and are bound by the lien of said execution; that the $1,000.00

mentioned in said contract as part of the debt due to said Dever Pickens, secured by the trust of said M. W. and Ledrue Coburn to said A. G. Dayton and one James Pickens, (who is now deceased), trustees, dated December 21st, 1885, was fictitious and fraudulent, of which said Mollie Pickens had due notice, as did also the said Dever Pickens and said surviving trustee, A. G. Dayton, and if not paid is bound by the lien of plaintiff's said execution, and if paid was paid in fraud of plaintiff's right in the premises, and said Mollie Pickens will be made to respond to the plaintiff for the amount thereof." The prayer of said second amended bill reads, in part, as follows: "To the end that the plaintiff may be relieved she prays that the said Mollie Pickens may be made to respond to the plaintiff as aforesaid, in case she has received the said sum of money; that the said contract may be declared void and fraudulent as to the plaintiff; that the said trust of January 14th, 1889, as to the debts secured therein to the estate of said James Pickens, Ann M. Pickens and R. M. Boring, may be declared fraudulent and void; that the lien of said execution may be enforced against the debts due to said Dever Pickens from the defendants, Mollie Pickens, A. S. Pickens, John D. Pickens, in his own right, M. S. Clevenger, A. H. Young, Emma Walker, M. W. Coburn and Ledrue Coburn, and that they may be restrained and enjoined from paying the same to anybody but the plaintiff; that the interest of Dever Pickens under said trust of January 14th, 1889, and said contract may be declared; that his interest in the real estate therein mentioned may be ascertained and subjected to the plaintiff's said judgment and exetion; that a lien may be declared in favor of the plaintiff therefor in case the same may be held fraudulent as of the date of the institution of this suit, to-wit, January 24th, 1889." The decree, brought up by the first appeal was made and entered on the 17th day of February, 1896, more than three years after the filing of said second amended bill. It was predicated not only upon the pleadings but upon evidence taken and was, therefore, a final adjudication upon the merits of the controversy. It dismissed all of said bills. This Court, on the appeal, reversed that decree and remanded the cause with specific directions, the mandate requiring the circuit court to further proceed in the cause, "according to

the principles stated and directions given in the written opinion aforesaid, and further according to the rules and principles governing courts of equity."

By reference to the opinion of this Court, at page 392, it will be seen that the attention of the Court went directly to the said Coburn debt of $2,050.89. Then followed this language: "And it is claimed by the appellant that the debt of two thousand fifty dollars and eighty-nine cents mentioned in said agreement is, by virtue of the lien of the plaintiff's bill, and the docketed execution therein mentioned, liable to her judgment, and the same should be charged against the person paying the same, or receiving payment thereof, with notice of plaintiff's rights, and against the funds in the hands of said general receiver, to-wit, the sum of eight hundred and eighty-six dollars and eighty-four cents, with interest, as stated in said agreement. This proposition is correct, as applying to the debtors mentioned in said assignment from the date of the filing of said first amended bill. Defendant Mollie Pickens failed to answer, and the amended bills were taken for confessed as to her." On page 393, the opinion directs the circuit court "to refer the cause to a commission to ascertain and report what moneys due on the claims assigned by Dever Pickens from the parties mentioned in the amended bills as debtors to him, if any, have been paid since the filing of the first amended bill, by whom and to whom paid, and whether the one thousand dollars of the debt secured by the trust deed made by M. W. Coburn and Ledrue Coburn of October 21, 1885, secured to Dever Pickens, and mentioned in the said marriage contract as having been assigned to Mollie Pickens, has been paid to her since the filing of the first amended bill, and whether any or all of such moneys have been paid or not; that the court take proceedings to collect all such money as may not be shown, upon proper and sufficient evidence, to have been paid prior to the filing of the said first amended bill, to be collected from the persons who have since received it, or from the debtors who may not have paid what they owe; and that the same, as fast as collected, be applied to the judgment or appellant, until the same is satisfied."

The argument against the claim that this matter is *res judicata* is that this Court, at that time, having dealt only

with the first amended bill, which asserted an execution lien upon said debt, cannot be regarded as having based its action on the allegations of the second amended bill, and, as the judgment on which the execution had issued was reversed, the execution lien failed, in consequence whereof the reason or basis of the decision has failed. Further argument in this connection is based on insufficiency of the allegations of the second amended bill and indefiniteness of some expressions in the opinion of the court. It is to be observed, however: that, in the opinion, it is said the defendant Mollie Pickens failed to answer and the *amended bills* were taken for confessed as to her. In another place the opinion says the court below shall, through its commissioner, ascertain and report what moneys due on the claims assigned by Dever Pickens from the parties mentioned, not in the first amended bill, but in the *amended bills* as debtors to him, if any, have been paid since the filing of the first amended bill; and the final direction is that the court take proceedings to collect all such money as may not be shown, upon proper and sufficient evidence, to have been paid prior to the filing of the said first amended bill, to be collected from the persons who have since received it, or from the debtors who may not have paid what they owe, and that the same, as fast as collected, be applied to the judgment of the appellant, until the same is satisfied; and in immediate connection with this direction the $1,000.00 claim of Mollie Pickens is mentioned. The first amended bill was filed in September, 1889. The money in question was paid by Melville Peck, special commissioner, to Alstor G. Dayton, attorney, on the 27th day of April, 1892, a long time after the filing of said first amended bill. All this was before the Court and specially mentioned in the opinion, and the positive, emphatic direction is, to cause to be collected and paid to the appellant in that appeal, the appellee in this one, all money which had not been paid prior to the filing of said first amended bill. The adjudication by this Court, notwithstanding any reasons assigned in the opinion, must be regarded as founded upon the record of the cause as it was when brought to this Court. The reference to the first amended bill seems to have been for the purpose of ascertaining the date on which the appellee first acquired a lien upon, or right to charge,

the personal property of the defendant. As the Court deemed this to have occurred upon the filing of said first amended bill, that was the date most frequently referred to in the opinion, but it does not follow that the adjudication stands only upon the first amended bill. On the contrary, there are references to the second amended bill, for the opinion mentions the "amended bills" more than once.

The allegation of fraud and notice thereof in the second amended bill might have been held insufficient on a demurrer thereto, had one been interposed, but it does not appear that anybody demurred to it, nor did Mollie Pickens answer it. Its insufficiency was not in any way questioned nor its allegations denied. Dever Pickens responded to it, denying the fraud alleged and notice thereof to said Mollie Pickens. Possibly his answer might have availed his sister, had it been brought to the attention of the court. But she was treated as being in default. The opinion says the amended bills were taken for confessed as to her. It is said in the brief that this Court, in the opinion rendered on the petition for rehearing, said "Her debt is not denied to have existed. Dever Pickens owed her the money." This is a misapprehension. The language attributed to the Court is quoted from the brief of counsel merely as argument. On the contrary, the opinion rendered on the petition for rehearing says the defendant Mollie Pickens was permitted, notwithstanding her helpless condition, to be allowed to remain in default by the other members of the family, as well as their counsel, and was thereby placed in such condition as to be in great danger of losing a large portion of her estate; and it seems that they, in their eagerness to save themselves, overlooked the interests of their unfortunate sister. What can be the meaning of all this language in the opinion, if the Court did not predicate its decision, in part, upon the second amended bill, alleging fraud?

As to all of the M. W. and Ledrue Coburn debt, except the $1,000.00 thereof claimed by Mollie Pickens, the litigation was between Susan C. Dent and Minnie B. Coburn. The first amended bill charged unequivocally that the assignment of said debt, less said sum of $1,000.00, was void in law and

fraudulent in fact, and that Minnie B. Coburn had notice of the fraud on the part of Dever Pickens and participated therein. The object of the bill was to charge that fund and subject the same to the payment of Susan C. Dent's judgment. Under well settled principles, such a bill, if sustained, gives a lien on the fund from the time of suing out process thereon. This bill set up the execution lien, but the object of that allegation was to charge the same fund by the assertion of a lien thereon, on an additional ground, namely, the execution. Plaintiff attempted by her first amended bill to subject that part of the Coburn debt which was claimed by Minnie B. Coburn, not on one ground, but on two grounds, fraud and the execution lien. Assuming that the execution lien did fail by reversal of the judgment, its failure in no wise affected the other ground. Minnie B. Coburn answered the bill and contested its allegations of fraud, there was a full hearing upon the issues thus made and this Court most unequivocally decided that, as against Minnie B. Coburn, said debt was liable to the plaintiff's claim.

As to the $1,000.00, part of the Coburn debt, claimed by Mollie Pickens, the litigation was between her and Susan C. Dent and proceeded upon the second amended bill, the allegations of which she did not deny, and the sufficiency of which she did not question, and this Court expressly decided that said sum was liable to the plaintiff's claim.

Whether the reversal of the judgment on which the execution had issued should have produced a different conclusion, is another question the adjudication has foreclosed. The second amended bill brought it to the attention of the court, as well as the recovery, in the second trial, of another judgment for $9,000.00, and the issuance of a new execution thereon. The inquiry now is not whether a correct decision was rendered, but simply what was decided. The record shows there was jurisdiction of the persons of the parties and also of the subject matter of the decision, and the grounds of all the contentions now set up, to show that the invalidity of the assignments of the Coburn debt was not decided, were disclosed to this Court by the record at the time the decision was rendered. Being then regarded as insufficient to prevent a decree in favor of the appellee, they can confer no authority

upon this, or any other court, to disregard the plain emphatic terms of the mandate in determining what was decided.

It is said the action of this Court on the second appeal, reported in 50 W. Va. 382, in reversing the decree of February 23, 1900, and in refusing to treat the decision rendered on the first appeal as an adjudication against a bequest of $2,000.00 to the executors of James Pickens, deceased, expressly charged by the will upon certain real estate, although omitted from the directions given in the opinion as to the liens on the property, would justify us now in disregarding so much of that opinion as purports to adjudicate the rights of the parties respecting the Coburn debt. A very plain distinction between the two subjects is perceived. The opinion made no reference to said $2,000.00 bequest or charge. It was not a subject of controversy in the cause. It was not attacked by any allegation of any bill filed. Here, the matter which is said not to have been adjudicated was brought to the attention of the court by the pleadings, was one of the subjects of controversy and was expressly considered and dealt with in the opinion as well as in the positive directions to the court below, embodied in the opinion, which the order of this Court commanded the court below to treat, and enforce, as a part of the mandate.

The reasons for the conclusion, that said $2,000.00 lien was not affected by the former decision, were stated in the opinion, in part, as follows: "The plaintiff filed a bill, first amended bill and second amended bill, and in none of these bills is there any allegation or charge that said two thousand dollars has been released or paid in any way. The contention, therefore, that the matter of this two thousand dollar claim is *res adjudicata* is not tenable. No issue was ever made upon it and it is not enough that it might have been set up in the same suit. Nothing charged in the bill made it necessary for the executors to assert said claim by way of defense to the bill. It, therefore, does not belong to that class of things which are deemed to be *res adjudicata* because they might have been adjudicated. * * * Matters are not adjudicated which have never been pleaded, or which the party asserting them was not bound to plead in the former suit by way of defense or in support of his claim as plaintiff."

The state of the record as to the matter now under consideration renders it impossible to apply this doctrine.

That the course pursued in arriving at the conclusion, above expressed, is authorized by our decisions, and harmonizes with principles declared by courts generally, admits no doubt. *Biern* v. *Ray*, 49 W. Va. 129, propounds the doctrine that a man is concluded by an adjudication, when the state of the pleadings, as to the matter in question was such as to call upon him to respond thereto, and as to those things which were actually litigated and decided. In that case, the plaintiffs escaped the rule, because their bill in the former case had made no reference to the property, they charged by their bill in the second suit. It was not in the former case, nor were they bound, by any principle of law or rule of procedure, to put it in; but, if they had been, the adjudication would have bound them, whether it was, in fact, in or not. *St. Lawrence Co.* v. *Holt and Mathews*, 51 W. Va. 352, illustrates the application of the rule to a different kind of a case. There, the bill alleged matter against Holt and Mathews, upon which relief against them was prayed. They failed to answer it, presumably because they deemed its allegations insufficient to afford a basis for a decree. Both the order made by this Court and the opinion pursuant to which the order was made, were more or less ambiguous. Nevertheless, the decree, dismissing the bill and thereby permitting a sale of the property, claimed by Holt and Mathews, to satisfy a deed of trust thereon, was deemed by this Court to have amounted to an adjudication of the question of title against Holt and Mathews. Insufficiency of the bill, as viewed from the stand-point of a demurrant thereto, and indefiniteness and ambiguity in the opinion and decree, availed nothing against the only deduction that could logically be made as to the court's action, and this, too, notwithstanding deprivation of the right of trial by jury of the issue of title, which would have been raised by full defense. As sustaining the conclusion, arrived at under general principles discussed in the opinion, an authority of no less dignity than a decision of the Supreme Court of the United States, is cited and relied upon, near the close of the opinion, namely, *Heffner* v. *Insurance Co.*, 123 U. S. 747. It is useless to repeat the reasons upon which these decisions are predicated, or discuss gener-

ally the principles of the doctrine under which this case falls. They are in no sense questioned, the only contention being that the case is not within them. Mere defective pleading is no objection. *Thompson* v. *Wooster*, 114 U. S. 104; *Heffner* v. *Ins. Co.*, 123 U. S. 747; *St. Lawrence Co.* v. *Holt and Mathews*, 51 W. Va. 352. When the decree is ambiguous, or makes the opinion a part thereof, the court looks to both as well as the pleadings in the cause to determine what has been decided. *St. Lawrence Co.* v. *Holt and Mathews*, cited; *Butler* v. *Thompson*, 52 W. Va. 311; Herman Estop. & Res. Ad. p. 470, section 402.

Though there was an adjudication as above stated, there was no personal decree or adjudication against Dayton, Davis or Bassel. There could have been none since they were not parties. But it was decided that Susan C. Dent had, by reason of her first amended bill, a lien upon that part of the M.W.and Ledrue Coburn debt claimed by Minnie B.Coburn from the date of the filing of said bill. It was out of that fund that there had been paid to Davis said sum of $125.00, to Bassel said sum of $150.00, and to Mollie Pickens said sum of $69.24. He received this money after the filing of said bill and the assertion of a lien thereon pending the suit. It was a proceeding against that particular fund. That fund constituted the subject matter of the litigation, and was subject to a lien in favor of Susan C. Dent at the time this money was taken out of it as aforesaid. Dayton, Davis and Bassel were made parties in their individual capacities to said third amended bill on which the present decree against them is predicated. They were bound to take notice of the pendency of this suit against that fund and of the lien thereon acquired by the filing of said first amended bill. Choses in action, as well as tangible personal property and real estate are subject to the rule *lis pendens*, when the institution of the suit gives a lien on the fund, as a bill to set aside a fraudulent transfer does under the law of this State. This was asserted as the general law of the country by the case of *Haddon* v. *Spader*, 20 Johns. (N. Y.) 554, decided in 1822, in which all the English cases on the subject were carefully reviewed and analyzed.

Bennett on Lis Pendens, on pages 140 and 141, after reviewing all the authorities, gives the following clear ex-

pression of his conclusion: "The conclusion seems warranted that after the bill is filed and *lis pendens* commences, the specific property involved in the litigation becomes subject to the claim or demand of the complainant; and, that if the claim or demand should turn out to be of such a nature, that the property ought to be subjected to it under the rules prevailing in a court of equity, the power of unrestricted disposition in the defendant would be suspended or lost, and a purchaser from him *pendente lite*, would take the property subject to the lien which attached upon it by the institution of the suit; that in the case of personal property, it would be immaterial whether the judgment were a lien or not when the suit was commenced, for in such case it is the execution and not the judgment which would become a lien, and that if its collection had been obstructed so that the levy could not be made by reason of fraudulent conveyance of the defendant, to remove which the bill was filed, and the execution remained in full force and capable of enforcement against the property but for the obstacles created by the fraudulent conveyances, the court would have jurisdiction over the property; and, hence, it would be bound by *lis pendens*. The authorities go even farther than that; and it is well settled in this country, that if a creditor files a bill to set aside fraudulent conveyances, and to have the property applied, by the aid of a court of equity, to the payment of his judgment, although no lien has been or can be acquired at law, he acquires a specified lien or power over the property by filing the bill, and is entitled to priority over other creditors; and that any party purchasing the property sought to be subjected, to the claim is a purchaser *pendente lite*."

Whether the lien extends to personal property at all has been a matter of controversy among the several courts of the country, some affirming, and others denying, the proposition, and those of the former class have differed as to the subjects of the rule and the extent of its application; but there seems to be, among them, practical unanimity in the view that, in creditors bills, insolvency proceedings and suits to set aside fraudulent conveyances and transfers and charge the property with debts, it has full operation, because, in such cases, a lien, or the equivalent thereof, is acquired by the

commencement of the suit. See 21 A. & E. Ency. Law 628, 629. This Court, in *Bruff* v. *Thompson*, 31 W. Va. 16, has countenanced the view that it applies in any case in which a lien has been acquired in any of the modes recognized by law, and Judge GREEN thought it should have still broader application. There is no occasion here to carry it further, and, not to apply it under such circumstances, would render it practically impossible to subject intangible property to the satisfaction of the debts of a fraudulent debtor. Nor, in so doing, is there any encroachment upon the principles which seem to inhibit the application of the rule to specific money and negotiable paper. Commencement of a suit to set aside a fraudulent conveyance, transfer or assignment, under our practice, creates a lien on the property so proceeded against. *Wallace* v. *Treakle*, 27 Grat. 479; *Foley* v. *Ruley*, 50 W. Va. 158; *Clark* v. *Figgins*, 31 W. Va. 156; *Geiser &c. Co.* v. *Chewning*, 52 W. Va. 523. The notice required by section 12 of chapter 139 of the Code was not filed, but that section applies to suits brought to charge real estate. *Osborn* v. *Glasscock*, 39 W. Va. 749.

Escape from the operation of this principle was attempted by the assertion of a claim of assignment, by Dever Pickens and Minnie B. Pickens, (nee Coburn,) of $1,000.00 of said Coburn debt, to A. G. Dayton, to be held by him as security for the payment of counsel fees to himself, John J. Davis and John Bassel, for services rendered and to be rendered by them in said action at law. The assignment is averred to have been made prior to the filing of said first amended bill, and a written instrument, evidencing the same, filed with a deposition, bears date, August 20th, 1889. The third amended bill charged retention and payment of this money by Dayton with fraudulent intent and full knowledge of the plaintiff's rights and of the fraudulent intent of the assignors, In his answer, he specifically denies any fraudulent intent, sets up the alleged assignment, and then denies generally, "each and every charge or intimation of fraud charged against him in plaintiff's original and amended bills either charged against him individually, or as trustee." He nowhere denies fraudulent intent on the part of Dever Pickens and Minnie B. Pickens, nor does he deny knowledge of their fraudulent intent in making said assignment. If, hav-

ing specifically responded to certain allegations thereof, he had denied generally all other allegations of the bill, his answer might have been sufficient, in the absence of an exception thereto, under the doctrine laid down in *Sandusky* v. *Faris*, 49 W. Va. 150, and *Burlew* v. *Quarrier*, 16 W. Va. 108, but the general denial stops short of notice and other material allegations, and is, therefore, purely argumentative and equivocal as to the matter of notice. Where fraud is alleged against a party who claims to be a *bona fide* purchaser without notice, or where he asserts a title as such, he must deny that he had any notice of the fraud of his grantor or assignor. " 'In all cases in which a party sets up his title to relief in equity as a *bona fide* purchaser, he must deny notice, though it be not charged. It is a general rule in pleading that whatever is essential to the right of the party and is necessarily within his knowledge, must be positively and precisely alleged, and the plaintiffs coming in the character of *bona fide* purchasers were bound to state affirmatively the equity of their case; if they will not aver the fact that they were purchasers without notice we are not bound to presume it. *Frost* v. *Beekman*, 1 Johns. Chy. Rep. 302; *Murray* v. *Ballou*, *Id.* 575. See also *Gallatin* v. *Erwin*, N. Y. 55-6.' " *Cochrane* v. *Hyre*, 49 W. Va. 315. Messrs. Dayton, Davis and Bassel no doubt rendered a large amount of efficient professional service to their clients, relying upon the understanding had with Pickens, as to security for their fees, and may have acted in the utmost good faith and without any knowledge of fraudulent intent on the part of their clients; but this is no excuse for failure to file a sufficient answer to the bill charging notice of the fraudulent intent of their clients. The plaintiff and the court, under such circumstances, were warranted in proceeding as if the undenied allegations were true. *Siers* v. *Wiseman*, 52 S. E. 460, 462; *Grant* v. *Cumberland &c. Co.*. 52 S. E. 36. That the assignment occurred before the bill attacking it was filed, is wholly immaterial. Fraudulent conveyances and assignments usually take place before institution of the suit. Equity will undo fraud as readily as it will prevent it.

If the averment of the assignment be regarded as new matter, set up as ground for affirmative relief, instead of treating the answer as a whole as having been intended to be a

mere response to the bill by way of denial of its allegations, the same rule would apply. In order to make out a good title on the face of the answer, and especially an equitable title, it would be necessary to affirm that the respondent was a purchaser for value *without notice*, the bill having alleged fraudulent intent on the part of the assignors; for proof of that fact against the assignors would necessitate want of notice thereof on the part of the assignees to make their title good. In alleging title, all the essential elements thereof must be set forth. The omission of any one of them is fatal. Averment of an assignment ante-dating the filing of the bill might logically tend to the conclusion that it was not fraudulent and that there was no knowledge of fraudulent intent; but it would not amount to an averment of want of notice. It is a mere evidential fact, not precluding either fraud or notice thereof.

From the principles and conclusions above stated, it results that A. G. Dayton was liable to the plaintiff for said sums of $69.24, $125.00 and $150.00, paid by him to Mollie Pickens, John J. Davis and John Bassel, respectively; and that, as said parties received it from him with knowledge of the source from which it was derived and all the circumstances, above referred to, so much of the decree as relates to said sums will be affirmed.

As said Dayton received said sum of $1000.00 and paid it to Mollie Pickens before the filing of said second amended bill, he stands in a different situation as to it. It cannot be said there was any pending suit with reference thereto at the time he received the money and he, therefore, violated no duty. For this reason, the decree should have required Mollie Pickens alone to pay said sum; and, in so far as it requires A. G. Dayton and Mollie Pickens to pay to Susan C. Dent $1,000.00 with interest thereon from the 12th day of May, 1892, until paid, the same must be reversed and a decree entered here, requiring said Mollie Pickens to pay said sum, with interest thereon as aforesaid, to said Susan C. Dent.

A cross-assignment of error is predicated on the refusal of the court to require the defendant A. G. Dayton to pay over to the plaintiff a balance of the Coburn debt, amounting to $376.97, part of which he retained on account of his fees as attorney for Dever Pickens, and the residue of which he ap-

plied on costs due from his client. That matter is not now before this Court, for the reasons assigned in disposing of other assignments of error as to matters not brought up by the appeal.

Affirmed in part. Reversed in part.

CHARLESTON

SNODGRASS *v.* JOLLIFF.

Submitted January 23, 1906. Decided March 13, 1906.

1. TAXATION—*Payments.*

Price conveys a tract of land to Higgins "except one-half the oil and gas royalty, which is one-sixteenth of all oil and gas underlying said tract of land;" Price conveys half of the sixteenth which he so excepted to Jolliff, McNeeley and Ice. Higgins is charged on the land tax book for 1901 with the tract without reduction of valuation for the interest in oil and gas reserved by Price. Price is charged on the land tax book for 1901 with one-sixteenth of the oil and gas. Jolliff, McNeeley and Ice are charged on the land tax book for 1901 with one-sixteenth of the oil and gas. Higgins pays his taxes and Price pays his, but Jolliff, McNeeley and Ice fail to pay their taxes. A sale of the interest of Jolliff, McNeeley and Ice in the oil and gas for taxes will not pass good title, because of the payment of taxes by their co-tenant, Price or Higgins. (p. 295.)

2. SAME—*Payment by Tenant in Common.*

Payment by a tenant in common of taxes for the common property under an assessment in his name will render a sale of his co-tenant's interest for taxes in his name for the same year void. (p. 295.)

Appeal from Circuit Court, Wetzel County.

Bill by R. E. L. Snodgrass against A. B. Jolliff and others. Decree for plaintiff and defendants appeal.

Reversed.

THOS. P. JACOBS, for appellants.

W. G. & E. B. SNODGRASS, for appellee.

BRANNON, JUDGE:

S. J. Price by deed granted a tract of fifty-three acres of land

in Wetzel county to Bramen Higgins "except one-half the oil and gas royalty, which is one-sixteenth of all the oil and gas underlying said tract of land." Later Price conveyed to A. B. Jolliff, G. B. McNeeley and C. H. Ice the one-half of the oil and gas which had been excepted by Price in his said conveyance to Higgins, the oil and gas thus conveyed to Jolliff, McNeeley and Ice by Price being one-thirty-second of the oil and gas in the tract. Thus Higgins owned one-sixteenth, Price one-thirty-second, and Jolliff, McNeeley and Ice a thirty-second of the oil and gas in the tract. Higgins caused the said tract of land to be entered on the land book immediately after he received his conveyance, and it was charged to him for the years 1900 and 1901 at the same valuation at which it was assessed in 1897, 1898 and 1899, without any reduction of value on account of the exception of the fraction of oil and gas excepted by Price, and Higgins paid the taxes on the tract for the years 1900 and 1901. Price had the sixteenth of the oil and gas in said tract excepted by him in his conveyance to Higgins entered on the land book for the years 1900 and 1901, and paid the taxes in his name for those years. Jolliff, McNeeley and Ice were charged for the year 1901 with one-sixteenth of the oil and gas in said tract, though they owned only one-thirty-second. Jolliff, McNeeley and Ice did not pay their taxes for 1901, and their interest was sold as one-sixteenth for delinquency and purchased by E. L. Snodgrass, who obtained a tax deed under such sale, the deed reciting their interest as one-thirty-second, the interest so sold being the same conveyed to them by Price as the one-thirty-second royalty. Price was charged before he conveyed to Higgins at the same valuation per acre at which the land was assessed to Higgins after he became owner. Higgins leased the tract for oil and gas production to the South Penn Oil Company, reserving one-eighth of the oil produced as a rent or royalty, the parties owning such royalty, or call it oil, in the fractions above stated. The oil company bored wells on the land and produced oil. After the bill of Snodgrass, now to be mentioned, had been filed, Jolliff, McNeeley and Ice paid Price their proportionate share of the tax which Price had paid on said royalty interest under the charge in his name. After Snodgrass obtained his tax deed he filed a bill in chancery to obtain a decree de-

claring his title good to the one-thirty-second interest of Jolliff, McNeeley and Ice under his tax deed, and to cancel their claim to it as a cloud over his title, and to declare that they no longer had any title to said one-thirty-second interest in the oil and gas, and to have an account of the oil produced after his tax deed, and to compel the said oil company thereafter to account to him for the one-thirty-second of the oil produced. Jolliff, McNeeley and Ice filed an answer stating such payment of taxes under said assessment to Higgins and that to Price, and claiming that payment of taxes by Higgins and by Price was payment for the interest of Jolliff, McNeeley and Ice, and claiming that as the assessor did not divide the value by charging the surface less the value of said mineral interest to Higgins and the oil and gas to Price and them, persuant to section 25, chapter 29, Code of 1899, the assessment to Jolliff, McNeeley and Ice was void, and the tax sale void. The case resulted in a decree holding the tax title of Snodgrass good to pass to him the title of Jolliff, McNeeley and Ice, and granting him the relief prayed for. Jolliff, McNeeley and Ice appeal from that decree.

It is claimed that the conveyance by Price to Jolliff, McNeeley and Ice vested in them a separate and several ownership in the oil and gas, and that the share of the oil and gas, so acquired by Jolliff, McNeeley and Ice, was properly charged on the land book to them separately from the surface, under section 25, chapter 29, Code 1899, and that a sale of their interest for taxes passed good title to Snodgrass. On the other hand, for Jolliff, McNeeley and Ice it is claimed that the Code section cited does not authorize the charge of a *fractional* interest in the oil and gas, but only requires such separate entry where one owner owns *all* the oil and gas, or other mineral, separate from the surface, and that the assessment to Jolliff, McNeeley and Ice of their fractional interest was illegal and a sale under it passed no title, as held in *Cunningham* v. *Brown*, 39 W. Va. 588. The argument is that the statute demands a division, by separate values, of surface from minerals, and that there was no divison by subtraction from the former total value of the tract, as it was before Price conveyed to Higgins, of the mineral value, and that the statute was not followed, and the assessment to Jolliff, McNeeley and Ice was void. We do not pass on these

contentions. If it be true that a fractional interest in minerals cannot be taxed to its owner separately from the surface, then the charge of the whole tract to Higgins at the unchanged surface value, without diminution by reason of the subtraction of the value of the one-sixteenth of the oil and gas retained by Price, would pay taxes on the whole, that is, the surface and all the oil and gas under it. *State* v. *Low*, 46 W. Va. 451. On the other hand, if such fractional interest is under the Code separately chargeable, then the charge of the whole one-sixteenth of the oil and gas to Price, covering his half of the one-sixteenth and the half conveyed by him to Jolliff, McNeeley and Ice, would answer for the ownership of Price, Jolliff, McNeeley and Ice, and payment by Price under the assessment in his name would pay also the taxes for Jolliff, McNeeley and Ice, because they and Price were co-tenants, and payment by one co-tenant of taxes on the common land pays for all the co-tenants. 17 Am. & Eng. Ency. L. (2 Ed.) 686; *Parker* v. *Brast*, 45 W. Va. 399. So would payment by Higgins, also a co-tenant. If two persons own a tract of land jointly and it is charged in the name of each one separately, would not payment for the whole tract by one of the owners under the charge of the tract in his name defeat a tax sale of the land in the name of the other owner? The case of *Bailey* v. *McClaugherty*, 48 W. Va. 546, is urged upon us to sustain the tax deed. It holds that where one person conveys a tract of land to another, and it remains on tax book in the name of the former owner, who pays the tax, and is also charged to the grantee, who fails to pay his tax, a sale in the grantee's name for taxes passes good title, notwithstanding payment by such former owner. That is not just this case. It is materially different. In that case the grantor and grantee were not co-tenants; whereas in this case, Price, Jolliff, McNeeley and Ice were co-tenants. In the *Bailey case* the sale was in the name of the only true owner. Were not taxes paid by both Higgins and Price—double taxes on the contested share?

Our conclusion is to reverse the decree of the circuit court, cancel the tax deed, and dismiss the plaintiff's bill without relief to him.

Reversed.

CHARLESTON

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TAHANEY v. BUILDING ASSOCIATION.

Submitted January 23, 1906. Decided March 13, 1906.

1. BUILDING AND LOAN ASSOCIATION---*Contract of Loan---Usury.*

A contract of loan with a building association, without naming a lump sum of premiums, provides that monthly premiums of fixed sum shall be paid for a fixed number of months. This fixes the amount and duration of payment of premiums with certainty, and the contract is not open to the charge of usury. (p. 298.)

2. SAME---*Usury.*

A contract of loan with a building association requires continuance of payment of lawful interest on the sum advanced, after cessation of dues and premiums, until the stock matures, unless it sooner matures. This does not make the contract usurious. (p. 299.)

3. SAME---*Competitive Bid.*

When an application for a loan on stock by a building association makes a bid of premium and it is accepted, and the deed of trust securing it states that a certain premium was bid for the advance, the loan is not illegal as not being a competitive bid. (p. 299.)

Appeal from Circuit Court, Tucker County.

Bill by Mary A. Tahaney against the Washington National Building & Loan Association and others. Decree for complainant, and defendant loan association appeals.

Reversed.

FORREST W. BROWN, for appellant.

J. P. SCOTT, for appellee.

BRANNON, JUDGE:

Mary A. Tahaney subscribed for five shares of installment stock in the Washington National Building and Loan Association, a Virginia corporation, requiring payment of sixty cents per month per share for ninety-six months, unless the stock matured earlier. After so subscribing for stock, she obtained from the corporation an advance of $500.00 on her stock, she giving a bond with condition to pay dues, interest and premiums, secured by a deed of trust on real estate in Tucker county. This trust required payment of sixty cents per share of stock monthly, and interest on the $500.00 at

fifty cents per share of stock monthly, and also a monthly premium of fifty cents per share for the first year, and for each succeeding year a monthly premium of ten per cent thereof less than the preceding year, that being the premium bid for the advancement, and such fines, charges and assessments as might be imposed under the charter, by-laws and regulations until such time as the shares should be paid up, "with the proviso that no payment on account of stock or premium shall be exacted for a longer period than ninety-six months from the date of said stock, but should said shares of stock fail to mature on or before the expiration of said period of ninety-six months then six per cent per annum on the original amount advanced thereon shall continue and be paid in monthly installments until said stock shall mature, when all payments shall cease and the deed of trust securing said bond be cancelled." Thus payment of dues and premiums stopped after eight years. Mrs. Tahaney paid for some years money to the association according to contract, and then ceased, and filed a bill in equity claiming that she had paid $489.61, with interest from 1st February, 1896, the date of the advance of money on her stock, and owed only a balance of $10.39; but that the association claimed an indebtedness against her of $335.00. She asserts that the contract is usurious, and that it should be held as a straight loan of $500.00, and that all her payments, including premiums, should be applied as partial payments, and not treated as premiums under the bond and trust. She prayed that an account be had of her debt by purging the contract of usury, and for a decree on that basis. A decree was pronounced in accordance with the claim of Mrs. Tahaney finding her balance $35.43, whereas the commissioner's report, under the claim of the association, showed a balance of $335.62. The association appealed.

It is conceded that this association had complied with the requirements of section 30, chapter 54 of our Code, and was authorized to do business in this State, and was possessed of the same right to contract as a domestic building association. It may therefore contract for premiums without impeachment of usury, if such premiums be payable as dictated by law, as section 26, chapter 54, Code, exempts a building association from the imputation of usury.

This contract is claimed to be usurious in that no lump sum

is fixed. It is admitted that there may be by section 26 minumum premium payable either in advance or in periodical installments, but it is claimed that there must be a lump sum fixed. Why? Do not periodical monthly sums of fixed amount for a fixed number of months make up a lump sum? Such a process is the same as if a lump sum were fixed. It is mathematically certain. Our cases interpret section 26, chapter 54, Code 1899, as demanding that the extent of payment of premiums be definite, and to answer that demand there must be a lump sum, but that it may be taken out of the advance in advance, or be distributed in stated periodical payments; but such lump sum need not in words be specified, and then distributed, because if the periodical payments be fixed in amount and number they make up a lump sum. The case of *Gray* v. *Baltimore, etc.*, 48 W. Va. 164, does not contravene this. It only means that the sum to be paid for premiums be definite—that is, capable of being known, not running indefinitely, and that if it is indefinite, the contract is open to charge of usury. A simple calculation tells what the premiums in this instance come to. They can run only eight years, and are of fixed monthly amounts. They are entirely consistent with the *Graves case*. The same may be said of *Floyd* v. *Loan Association*, 49 W. Va. 327; *McConnell* v. *Cox*, 50 *Id.* 469, and *Prince* v. *Building Association*, 55 *Id.* 19. They do say that there must be a "lump" sum, certain and definite, not percentage payable *indefinitely* at fixed periods; but they recognize right to periodical payments. The by-laws of this company provide for stated payments. It is a mere play on words to say that where the premiums are not to be paid in advance, but in periodical certain sums, the calculation must be made of what total or lump sum the payment aggregated and insert it in the papers. Would it make the party pay any more or any less? Does he not know just what he has to pay? The trouble with the contracts in the cases just named was that no lump sum was named, nor were there periodical payments fixed in amount and number. But all disputation as to this is foreclosed by the late case of *Thompson* v. *National Mutual Building Association*,(50 S. E. 756), 57 W. Va. 551. It says that where the contract calls for "monthly payments for a stated and definite number of years, or until the maturity of the shares, should they mature

before the close of the years stated, the amount of the premium is sufficiently certain and definite," and the contract as written is valid. That case is consistent with former cases, and rules the case we have in hand. It would answer no purpose to go over the ground again in this case. And *Archer* v. *Baltimore B. and L.*, 45 W. Va. 37, does not in words call for a lump sum, but allows periodical payments.

Counsel says that our statute contemplates that the by-laws fix a minumum premium, but in this case it is a maximum. The by-laws fix a premium of fifty cents. If Mrs. Tahaney bid with competitors, she could not get a less premium, but might pay more. How is she thus injured? Counsel cannot mean that a maximum and minimum must be put in the contract. That would make it uncertain. The statute does not mean this, but that the by-laws fix a minimum. The papers prove that Mrs. Tahaney got the loan by bidding; but say that the loan was awarded her as the value of her shares in default of bidders. We may presume so. She elected so to take. And she is not hurt as she got the minimum. The by-laws provide for such competitive bidding, and her application for the advance stated her bid, and the deed of trust says her bid was as above stated.

But it is contended that the contract is tainted with usury because it provides that if the shares of stock should not mature in eight years, then six per cent. interest of the original amount of the loan should continue until the stock should mature. This is no usury. It is interest only on the actual money received by the borrower until the debt shall be discharged by the maturity of the stock. We must not fail to remember that interest is one thing, its purpose being to keep down lawful interest while the stock is maturing from dues, premiums and dividends. Premiums and dues are different things from interest, their office being to mature the stock, which, when mature, pays the principal of the debt.

Endlich on Building Associations, § 409, is cited to show that a loan can only be by competition for the loan; but our statute says it may be otherwise in default of bidders, and we have right to say this was the condition, though the papers say Mrs. Tahaney got the advancement by bid. It seems, too, from the books that the requirement of competitive bidding has the purpose of enabling the borrower to get as low

a premium as he can. If the loan is governed by a fixed premium, he cannot get it lower. Endlich on Building Associations, § 410. But our statute expressly gives power to fix a minimum. And it forbids a loan by open bidding at less than the premium, since if no one bids it, the association may award the money, without bidding to a shareholder to the value of his stock at that premium. We do not see any force in this view of competitive bids. It would seem to be required, under our statute for the mutual benefit of members, for the association, not the borrower.

Brief of counsel enters into argument to show that this association by reason of want of mutuality and other features is not a building and loan association, meaning, as I understand, that it is not entitled to contract as such. It has West Virginia authority as such. It is a corporation under the law of Virginia, and accredited as such in this State. Can its powers be thus collaterally attacked, when neither state contests? And, again, after Mrs. Tahaney, by her deed, has contracted with it as such corporation, she cannot deny its corporate existence. *Singer Co.* v. *Bennett*, 28 W. Va. 16.

An impression is abroad that a loan by a building association is nothing but a simple loan at six per cent interest, with right to apply all money paid for interest, dues and premiums as partial payments. Under that impression likely Mrs. Tahaney ceased payments, and disaster followed, whereas, if she had gone on, her debt would likely have been paid by her stock. If members do not pay according to contract the whole plan or nature and object of the contract must be defeated. These associations were authorized in order that poor persons by sobriety, energy and frugality might get homes and be lords of their castles by small payments from time to time; but if members do not conform to the requirements the project fails them. Courts cannot overthrow valid contracts. The Legislature has made these contracts, conforming to legal regulation, valid, and whether the moneys paid exceed legal interest or not, and though they do, the Legislature, to attain the purpose of such institutions, has said that these contracts shall not be subject to the defense of usury.

We therefore reverse that part or provision of the decree of 10th June, 1905, fixing the debt of the Washington Na-

tional Building and Loan Association at $35.43, and it is adjudged, ordered and decreed that the debt of said association, in the record specified, constituting the first lien in order upon lot No. 16 in said decree mentioned, is $355.62, with interest from the 7th day of March, 1905, and that said decree be modified accordingly.

Reversed.

CHARLESTON

ANDERSON v. TUG RIVER COAL AND COKE COMPANY.

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Submitted February 20, 1906, Decided April 10, 1906.

1. NEGLIGENCE—*Persons Liable—Acts of Independent Contractors.*

Where one, for a stipulated price per piece, contracts to procure timbers for a mining company for use in its mine, from the lease of the company, and the company retains no supervision of the work, or control of the manner of doing it, and the contractor is responsible to it only to the extent of procuring satisfactory timber and delivering it at such times and places as needed, and employs and pays his own help in doing so, such contractor exercises an independant employment, and the company is not liable to one in its employ who is injured by the contractor in negligently prosecuting his work. (p. 304.)

2. SAME.

Where a competent and fit person renders services in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means of its accomplishment, such work not being in itself unlawful, or of such a nature that it is likely to become a nuisance, or to subject third persons to unusual dangers when being prosecuted in the usual and ordinary manner, such person exercises an independent employment, and the person so employing him is not liable for wrongs committed by him, his agents or servants in the prosecution of such work. (p. 305.)

3. SAME—*Independent Contractor—Question for Jury.*

Where, from the evidence, it is to be determined whether or not one is an independent contractor, and the evidence is so conflicting as to support a finding of the jury, then it is purely a question for their determination, but if the evidence is without conflict, it then

becomes a question of law as to whether or not an independent employment has been established. (p. 303.)

4. APPEAL—*Reversal—Insufficiency of Evidence—Rendering Judgment.* Where a motion is made to exclude the plaintiff's evidence because not sufficient to support a verdict in his favor, and the motion is overruled, and this Court reverses the judgment because of the insufficiency thereof, it will enter judgment for the defendant without remanding the cause, although the defendant introduces his evidence, where such evidence, taken in connection with that of the plaintiff, does not support the verdict, and where it does not appear that injustice will result from so doing. (p. 312.)

5. SAME. Where, at the conclusion of the evidence, the defendant asks for a peremptory instruction, directing a verdict in its favor, which the court refuses to give, and this Court reverses the judgment because the evidence is not sufficient to support the verdict, or because the verdict is contrary to the evidence, judgment will be entered by this Court for the defendant, without remanding the cause, unless satisfied that such course would be unjust. (p. 314.)

Error to Circuit Court, McDowell County.

Action by Harvey Anderson, by his next friend, against the Tug River Coal & Coke Company. Judgment for plaintiff. Defendant brings error.

Reversed, and Judgment Rendered.

RUCKER, ANDERSON & HUGHES, for plaintiff in error.

D. J. F. STROTHER, for defendant in error.

SANDERS, JUDGE:

The plaintiff, Harvey Anderson, an infant, suing by his next friend, brought an action in the circuit court of McDowell county against the defendant, Tug River Coal and Coke Company, claiming damages for a personal injury alleged to have been sustained by him while working in the defendant's coal mine, and on account of the negligence of the defendant. A verdict and judgment in favor of the plaintiff was rendered for $1,800, and the same has been brought here for review on writ of error and *supersedeas*.

The defendant company, at the conclusion of the plaintiff's evidence, moved the court to exclude it from the jury and to direct a verdict in its favor, which motion was overruled, and at the conclusion of the trial, after all the evidence had been introduced, the defendant asked the court to instruct the jury to return a verdict in its favor, which instruction the court

refused to give. The refusal of this instruction presents the real ground of complaint here. To determine whether or not this instruction should have been given, it will be necessary to inquire what relation J. I. Garretson sustained to the company. It is presented by the plaintiff in error that the relation of master and servant did not exist between the company and Garretson, but that he was an independent contractor, and this being so, and the injury being the direct and proximate result of his act, that the company should not be held liable therefor.

The defendant in error insists that the determination of this question is one of fact, and it should be left entirely with the jury. This would be true if there were such conflict in the evidence as would support a verdict if found for the plaintiff. But when the evidence is not conflicting, there is nothing for the jury to decide, and it then becomes a question of law as to whether or not the facts proved are sufficient to support the particular theory or contention advanced. If the question at issue is one of fact, and the facts adduced are sufficient to support the verdict, or where the evidence is so conflicting as to support a finding for either the plaintiff or defendant, then the matter is purely a jury question. The facts in this case, however, are substantially without conflict, and, therefore, the rule advanced by counsel for plaintiff does not obtain here. "What constitutes an independent employment, so as to make the person engaged in the employment an independent contractor within the meaning of the rule under consideration, is a question of law for the court, and not a question of fact for the jury; but, as in other cases, subject to the rule that the jury are to determine the facts upon which the decision of the question of law is to be made." Thompson Comm. on Negligence, volume 1, section 641; *Emmerson* v. *Fay*, 94 Va. 60.

The evidence discloses that the defendant was, at the time of the injury complained of, the owner of a mining lease, in area about one mile in length by about a quarter of a mile in width, on which a coal mine had been opened and was being operated; that the plaintiff, who was about nineteen years of age, was employed as a driver in the mine. The mine was not running on the day of the injury, and the plaintiff was set to work, hauling slack from the outside to the inside of

the mine, which was used in ballasting the track. While the plaintiff was so at work on the outside, a noise was heard, to which plaintiff's attention was called, and he started to run, but just then a log came down the mountain side and rolled into the driftmouth, knocking down some timbers, one of which struck and injured him.

At the time of the injury, J. I. Garretson and his brother were at work on the mountain side, about three hundred yards above the driftmouth, getting out timber for use in the mine as props, cross-ties and caps. The timber which caused the injury was started on the hillside above the driftmouth by Garretson, and was supposed to stop about thirty feet therefrom, where it was worked up, but this piece was going very fast, and ran out of the usual way and over a point of land, instead of following the hollow, as the others had done; and this was the first piece that had done so. This work was being done by Garretson under a contract with the defendant company, by which Garretson was to get out props and cross-ties for so much per peice, and caps for so much per hundred, to be delivered by him to the various driftmouths of the mine. Under this contract, Garretson was responsible to the defendant only for results—that is, the defendant had no control over cutting the timber, and so long as it was furnished in a satisfactory manner, Garretson was to receive a stipulated price per piece for it, and if the timber was not gotten according to contract, the defendant had a right to cancel it. Garretson had the privilege of getting timber anywhere on the lease of the defendant; he was not restricted to any point, and the manner of delivery was left with him, and he employed his own help in doing so, without, in any wise, consulting the defendant. He had cut timber all around the driftmouth where the accident occurred. It is not shown that the defendant company knew that Garretson and his brother were at work above the driftmouth, or that they were, in fact, working at all on the day the accident occurred. So far as the record discloses, no one but themselves knew that they were so at work, and under the contract Garretson chose his own time to work, only being responsible for the delivery of the timber cut by him in quantities as needed.

We deduce from the evidence that it does not show that the relation of master and servant existed between the com-

pany and Garretson, but, on the other hand, it appears that Garretson was exercising an independent employment, over which he had exclusive and absolute control. While it is true he stated in his evidence that he was doing this work under the control of the defendant, yet, when he states the terms of the contract, it is apparent that this statement is not entitled to the consideration which the defendant in error attempts to give it, for by the terms of the contract as given by him, which do not substantially conflict with the evidence of the defendant, it is clearly shown that the work being done by him was that of an indepenent contractor, and that it was not under the control of the company. The company had no power to control him in the execution of this work, and the only power it reserved to itself in regard to it, was the right to cancel the contract if not complied with by Garretson. It had no right to direct when the timber should be gotten out and delivered, or when it should be delivered. It only stipulated with Garretson that it would pay a certain price per piece, and that he should procure the timber at such time as the company needed it. No supervision of his work was reserved by the company. He had exclusive power to select any one to assist him in carrying out his contract, and had the right to procure this timber from any point upon the lease of the company. The law is now well settled that the employer of one who exercises an independent employment, over which the employer has no control, is not responsible for the negligence of one in such employe's service or to third persons injured by reason of the negligent acts of the employe or his servants, if, however, the employer has used reasonable care to select a contractor of proper skill and prudence. While this doctrine is well settled, it will not be amiss to give what some of the eminent law writers say upon this subject, and to show by the decisions of many states that what they have said is sound. Thompson, in his work on Negligence, volume 1, section 621, lays down the general rule to be: "It is a general rule that one who has contracted with a competent and fit person, exercising an independent employment, to do a piece of work not in itself unlawful, or of such a nature that it is likely to become a nuisance, or to subject third persons to unusual danger, according to the contractor's own methods, and without being subject to control except as to the results

of his work, and subject to other qualifications hereinafter stated,—will not be answerable for the wrongs of such contractor, his subcontractor or his servants, committed in the prosecution of such work." And in the following section, 622, it is again stated: "An independent contractor, within the meaning of this rule, is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. The contractor must answer for his own wrongs and the wrongs committed in the course of the work by his servants. In every case, the decisive question is, Had the defendant the right to *control*, in the given particular, the conduct of the person doing the wrong? Does he reserve to himself the essential powers of a master? It is but another form of language, expressing the same idea, to say that the true test to determine whether one who renders service to another does so as a contractor, or not, is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the *result* of his work, and not as to the *means* by which it is accomplished. On this question, the contract under which the work has been done must speak conclusively in every case, reference being had, of course, to surrounding circumstances." And, also, we find in 16 Am. & Eng. Ency. Law, (2d Ed.), 187, the law to be announced as follows: "Generally speaking, an independant contractor is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished." Also, same volume, on page 188, it is said: "A reservation by the employer of the right by himself or his agent to supervise the work for the purpose merely of determining whether it is being done in conformity to the contract does not affect the independence of the relation."

In Shearman and Redfield on Negligence, vol. 1, section 164, it is said: "The true test of a 'contractor' would seem to be, that he renders the service in the course of an independent occupation, representing the will of his employer only as to the *result* of his work, and not as to the means by which it is accomplished. The mere fact of direction as to things to be done, without control over the method or means

of doing them, does not make a contractor a servant." And we also quote from section 166: "It is now practically settled that the reservation, in a contract, of the right to inspect the work at all times and to have it done subject to the approval of the employer, without any right to dictate the details or methods or to interfere with servants, does not make the contractor a servant;" and in section 168 it is said that the employer is not liable for the contractor's negligence: "It appearing, from the definition which we have given of a contractor, that he is not the agent or servant of his employer in relation to anything but the specific results which he undertakes to produce, it follows that his employer is not responsible to third persons for his negligence, nor for the negligence of his servants, agents, or subcontractors in the execution of the work."

Mechem, in his work on Agency, section 747, says: "The principal's liability for the acts of his agent, within the scope of his authority, depends upon the fact that the relation of principal and agent exists. It is the principal's will that is to be exercised; his purpose that is to be accomplished; his are the benefits and advantages which ensue. He selects his own agent, puts him in motion, and has the right to direct and control his actions. It is, therefore, just and proper that he should be responsible for what the agent does while so employed. Where, however, the principal has not this right of control a different rule prevails. Neither reason nor justice requires that he should be held responsible for the manner of doing an act when he had no right or power to direct or control that manner. If, therefore, the principal, using due care in the selection of the person, enters into a contract with a person exercising an independent employment, by virtue of which the latter undertakes to accomplish a given result, being at liberty to select and employ his own means and methods, and the principal retains no right or power to control or direct the manner in which the work shall be done, such a contract does not create the relation of principal and agent or master and servant, and the person contracting for the work is not liable for the negligence of the contractor, or of his servants or agents, in the performance of the work. The employment is regarded as independent where the person renders service in the course

of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished.

In *Emerson* v. *Fay*, 94 Va. 60, it was held that a person employed to construct a building, with materials to be furnished by the owner, and according to certain plans, who was to receive in payment a per diem for himself and the other men engaged in the work, who were to be paid by him, is an independent contractor, and occupies the relation of master to such employes, for whose negligence the owner is not liable—the work contracted for being lawful.

In *Bibb's Admr.* v. *N. & W. R. Co.*, 87 Va. 711, which was an action to recover damages for the death of the plaintiff's intestate, caused by the collapse of a bridge on which he was working, the court held that where an employer selects with due care a competent contractor, and commits to him a work that is lawful, and such as may be done without injury to third persons, and to be done in a workmanlike manner, at a stipulated price, such employer cannot be held liable for injuries caused by the negligence of such contractor or his servants to third persons.

In *Carter* v. *Berlin Mills Co.*, 58 N. H. 52, (42 Am. Rep. 572): A. contracted to have B. cut timber on A's land, at a certain price per foot, and deliver it at the mouth of a river, using A's dams for driving the logs, if he chose. By B's unreasonable use of A's dam, C's lands were flooded, but A. had nothing to do with cutting or driving the logs, and it was held that A. was not liable for C's injury.

In *Boomer* v. *Wilbur*, 176 Mass. 482, the owner of buildings employed a competent independent contractor to repair the chimneys of their buildings, who was to do the work without supervision of the owners over the details of the work, or the manner in which it should be done, and it was held that they were not liable to a person who was injured on the street by falling bricks, caused by the contractor's negligence.

In *Harrison* v. *Collins*, 86 Pa. St. 153, (27 Am. Rep. 699). the owner of a sugar refinery employed a rigger to remove

machinery from a railroad car to the refinery. In doing the work, the rigger opened a coal hole in the sidewalk, and left it open a few minutes after the work was finished. A lad fell into the hole and was injured. The rigger was paid by the day. The court held that if one renders services in the course of an occupation representing the will of his employer only as to the result of his work, and not as to the means of accomplishment it is an independent employment—the fact that the contractor is paid by the day is immaterial.

In *Harris* v. *McNamara*, 97 Ala. 181, the court held an ore digger, who furnishes his own tools and appliances, who employs and pays his own assistants, and who is paid by the mine owners a certain sum per car for ore mined by him, is not a servant of the mine owners, but an independent contractor, as the means and details of the execution of his work are subject to his own exclusive control and management; and hence the wrongful employment of an infant by the ore digger does not render the mine owners liable to the infant's parents for his death.

It was held in *St. Louis, &c., Ry. Co.* v. *Yonley*, 53 Ark. 503, that a person employed by a railroad company to clear off and burn the rubbish from its right of way at so much per mile, who hires, pays and controls his own help, is not a servant of the company, but an independent contractor; and the railroad company was not liable for damage caused by the spread of fire, owing to the negligence of the contractor and his employes.

In the case of *Town of Pierrepoint* v. *Loveless*, 72 N. Y. 111, mill owners who had severally placed saw logs on the ice in the Racket river, severally contracted with S. to drive and put them in the respective booms. Other parties also placed logs there, and employed servants to drive them down. The logs all got mixed in driving; and by the negligence of the drivers, a jam was formed, which carried off a bridge. It was held, in an action by the town to recover damages, that S. was not a servant, but an independent contractor, for whose negligence those so contracting with him were not answerable.

In *McCarthy* v. *Second Parish of Portland*, 71 Me. 318, the plaintiff was injured by the carelessness of men occupied

in repairing the roof of defendant's building. The work was being done by men who were employes and under the orders of one who carried on the business of slating roofs, and who was engaged to do the work in question. It was held that the slater carried on an independent employment, and the defendant was not liable.

Chief Justice Bigelow, in *Brackett* v. *Lubke*, 4 Allen 138, says: "If the person employed to do the work carries on an independent employment, and acts in pursuance of a contract with his employer, by which he has agreed to do the work on certain specified terms, in a particular manner and for a stipulated price, then the employer is not liable; the relation of master and servant does not subsist between the parties, but only that of contractor and contractee. The power of directing and controlling the work is parted with by the employer and given to the contractor. But on the other hand, if work is done under a general employment, and is to be performed for a reasonable compensation or for a stipulated price, the employer remains liable, because he retains the right and power of directing and controlling the time and manner of executing the work, or of refraining from doing it if he deems it necessary or expedient."

In *Cincinnati* v. *Stone*, 5 Ohio St. 38, it was declared that the principle of *respondeat superior* does not apply to cases of independent contracts not creating the relation of principal and agent, and where the employer does not retain the control over the mode and manner of the performance of the work under the contract. To the same effect is *Gwathney* v. *Little Miami R. R. Co.*, 12 Ohio St. 92.

In *Corbin* v. *American Mills*, 27 Conn, 274, it is said, to render the employer liable, "the employe must be acting at the time strictly in the place of the employer, in accordance with and representing the employer's will and not his own; and the business must be strictly that of the employer, and not in any respect the employe's."

In *Wood* v. *Cobb*, 13 Allen 58, the court said it is too well settled to admit of debate, that the employer of one who exercises an independent employment, is not responsible for the negligence of one in the latter's service.

In *Pearson* v. *Cox*, 2 C. P. Div. 369, a tool, called a straight-edge, was jostled out of a window of a house that was being

built, and fell upon the plaintiff and injured him; but it appearing that the act which caused the straightedge to fall was the act of one of the men employed by the mason, a subcontractor, the court held that the builders of the house were not liable.

It must be borne in mind that in the selection of the independent contractor, the employer is charged with the duty of exercising reasonable care to secure a person of skill and prudence, and the work to be done must not be, within itself, unlawful, or of such a nature that it is likely to become a nuisance, or to subject third persons to unusual dangers, when being prosecuted in the ordinary and usual manner. Thompson on Negligence, sec. 645, says: "The modern doctrine seems to be that if one engages with a contractor to do an act which may be done in a lawful manner, and the contractor in doing it *unnecessarily commits a nuisance*, whereby injury results to a third person, the employer will not be liable. In other words, if the act or neglect which produces the injury is purely collateral to the work contracted to be done, and entirely the result of the wrongful acts of the contractor and his workmen, the proprietor is not liable; but if the injury directly results from the work which the contractor engaged and was authorized to do, he is equally liable with the contractor."

It will be observed that the author, in the concluding part of this section, says: "but if the injury directly results from the work which the contractor engaged and was authorized to do, he is equally liable with the contractor." This means where the work itself is of such dangerous character as that injury may result therefrom, notwithstanding its accomplishment is unattended with negligence, and though it be done with prudence and care, and does not apply where the work to be done is not of itself dangerous to others, unless it becomes so by the negligent or unskillful manner of its execution. *Davie* v. *Lery & Son*, 39 La. 551; *Hundhausen* v. *Bond*, 36 Wis. 39; *Chicago City* v. *Robbins*, 67 U. S. 418; *Robbins* v. *Chicago City*, 71 U. S. 667; *O'Rourke* v. *Hart*, 7 Bosw. (N. Y.) 511.

There is no complaint that the company did not exercise reasonable care and prudence in the selection of a competent and proper contractor. But it is claimed the evidence does

not show that Garretson was an independent contractor, but that, on the other hand, it appears therefrom that he was a servant of the company. When we apply the law to the facts of this case, there can be no other conclusion reached, as we have observed, than that he was an independent contractor, and that the relation of master and servant did not exist between him and the defendant.

The defendant in error insists that it was the duty of the company to provide a safe place for him to work, and in this it failed to discharge its duty, because the place at which he was employed to work was rendered unsafe on account of the work which was being done in getting out the timber. It is an elementary rule of law that the master must exercise reasonable care to furnish and continue to provide a reasonably safe place for his servants to work, and this is a duty which is imposed upon the master, and which cannot be delegated by him to others to the extent of relieving him from liability for a failure to discharge it. This rule of law is not questioned, but it cannot be applied here. There is no question that the mine at which the plaintiff was employed to work was in a perfectly safe condition—in fact, the injury was not caused from any mismanagement of the mine or from any result proceeding from its operation, but it was the result of the act of one whose business was entirely separate and distinct from that being carried on in which the plaintiff was employed to assist. There was no connection between the operation of the mine and the procurement and delivery of the timber. It is true the timber was used in the mine, but because of this it cannot be said that the work of procuring it was in any way connected with the actual operation of the mining enterprise, even if this would alter the case. The act of cutting and delivering the timber did not render the place at which the plaintiff was employed to work, unsafe, because if the timber had been secured in a proper manner, and without negligently skidding it down the hill, the injury would not have occurred. It was the negligent manner of prosecuting the work in delivering the timber that caused the injury, and not the lack of safety of the place at which the plaintiff was employed to work.

As the case now stands, all we have to inquire is, whether judgment should be entered for the defendant here, or should

the case be remanded for a new trial. We have determined that the evidence is wholly insufficient to sustain the verdict of the jury, and, from the very character of the case, we can see that a new trial can avail the plaintiff nothing. Therefore, under such circumstances, it would seem entirely unnecessary to remand. Litigation should be speeded, and its termination quickly reached, and to bring about this end, frivolity and idle practices should be discountenanced. In *Maupin* v. *Insurance Co.*, 53 W. Va. 558, it was made a query: "If the Supreme Court holds that a verdict for the plaintiff is without sufficient evidence, or contrary to the evidence, and reverses the judgment for that cause, will it grant a new trial or enter judgment for defendant?" This was not decided in that case. Neither is it necessary to decide it here, because, as we have observed, at the conclusion of the plaintiff's evidence, a motion was made to exclude it, which the court overruled. "If a defendant, giving no evidence, moves the court to exclude the plaintiff's evidence as not sufficient to warrant a verdict for plaintiff, or to direct a verdict for him, and his motion is overruled and this Court reverses the judgment for that cause, it will not remand the cause for another trial, but will enter judgment for the defendant, or, as it chooses, direct the circuit court to do so, unless satisfied that it will work injustice." *Maupin* v. *Insurance Co.*, 53 W. Va. 558. This rule should not be different where the defendant does introduce evidence, where all the evidence taken together, does not entitle the plaintiff to recover. There is no reason for such difference. The fact of the introduction of testimony by the defendant has not changed the status of the case. The court is asked to exclude the evidence, and improperly refuses to do so, and because the defendant attempts to strengthen his case, he should not lose the benefit of his motion, especially in so far as he is entitled to have judgment entered for him in this Court, on the ground that he made such motion and it was overruled. It is true we have cases holding that where the defendant introduces evidence, after his motion to exclude is overruled, the error, if any, by reason thereof, is waived, but this rule cannot be applied where the evidence of the defendant, when introduced, does not strengthen the plaintiff's case, and when, taking the whole evidence together, the plaintiff is not enti-

tled to recover. In *Core* v. *Ohio River R. Co.*, 38 W. Va. 456, it was held that if the defendant, after the court had overruled its motion to exclude the plaintiff's evidence, on the ground of insufficiency, introduces its evidence, this Court will disregard such motion and will not reverse the judgment, unless it appears that the whole evidence is insufficient to justify the verdict of the jury. And in the case of *Trump* v. *Tidewater Coal and Coke Co.*, 46 W. Va. 238, it is said that a motion to exclude the plaintiff's evidence for insufficiency is waived by the defendant after such motion is made introducing his evidence, as his evidence may cure the defects of the plaintiff's. Where, however, there is not sufficient evidence to support a finding for the plaintiff, there is no reason to say that this Court should not, when such motion is made and overruled in the court below, give judgment for the defendant here, when it was the duty of the court below to have excluded such evidence, and rendered judgment for him. But, again, at the conclusion of all the evidence, the defendant asked the court for a peremptory instruction, directing the jury to find a verdict in its favor, which instruction the court refused. The offering of this instruction was equivalent to a demurrer to the evidence. *Maupin* v. *Insurance Co.*, 53 W. Va. 558. It was the duty of the court to give this instruction, and enter judgment for the defendant, and not having done so, it is now proper for this Court to do what the court below should have done.

The judgment of the circuit court is reversed, the verdict of the jury set aside, and judgment is entered for the defendant.

Reversed, and Judgment Rendered.

CHARLESTON

STATE v. SARAH ANN LEGG.

59 315
f62 132

Submitted March 7, 1906. Decided April 10, 1906.

1. CRIMINAL LAW— *Record—Evidence—Bill of Exceptions.*

Where evidence is certified by the trial judge, and a separate bill of exceptions is used to make it a part of the record, a reference in the bill to the certificate of evidence, stating that it is made a part of the record, and a part of the bill of exceptions, is sufficient to make the evidence a part of the record. (p. 317.)

2. WITNESSES—*Refreshing Memory—Memorandum.*

The testimony of a witness, upon the preliminary examination of one accused of crime, may be used by the witness upon the trial of such accused person for the purpose of refreshing his present recollection, but when so used it is not admissible in evidence and should not be read to the witness in the presence of the jury. (p. 321.)

3. CRIMINAL LAW—*Evidence—Sworn Statement of Accused.*

Where a justice, for the purpose of determining whether or not he will hold an inquest, takes the sworn statement of a person who is not, at the time, accused of killing the deceased, but against whom an indictment is afterwards preferred, such statement is admissible upon the trial of the accused; not having been made by the person as a witness upon a legal examination, it is not protected under section 20, chapter 152, Code 1899. A justice, in taking such statement, is without warrant of law. (p. 323.)

4. HOMICIDE—*Evidence.*

Upon the trial of a wife, for the murder of her husband, testimony tending to show the existence, prior to the alleged killing, of adulterous relations between the prisoner and a third person, is admissible, for the purpose of showing motive for the commission of the offense. (p. 324.)

5. SAME—*Instructions.*

Where, upon a trial for murder, the killing is shown to have been done with a deadly weapon, and the defendant relies upon accidental killing as an excuse, it is a question for the determination of the jury as to whether the killing was intentional, or the result of an accident. And when the evidence tends, in an appreciable degree, to establish both theories, it is the duty of the court to instruct the jury presenting both, if asked to do so. (p. 325.)

6. INSTRUCTIONS—*Purpose Of.*

The purpose of giving instructions is to aid the jury in arriving

at a proper verdict, and the practice of repeating them is discountenanced. (p. 327.)

6. SAME—*Credibility of Witnesses.*

It is not error, where an instruction is asked telling the jury that they are the sole judges of the credibility of the witnesses, and that they have the right to believe or not believe any witness who has testified in the case, to modify the instruction so as to tell them that they cannot arbitrarily disregard the testimony of a witness unless they believe it untrue. (p. 328.)

8. HOMICIDE—*Instructions.*

An instruction which tells the jury that before they can find the defendant guilty of murder, they must believe from the evidence beyond all reasonable doubt, that the defendant willfully, maliciously, deliberately, feloniously and unlawfully killed the deceased, is erroneous, in this, that it is not necessary that these elements should co-exist in order to find the defendant guilty of murder in the second degree. (p. 329.)

9. SAME.

An instruction saying that before the jury could find the defendant guilty of murder, they must believe from the evidence beyond all reasonable doubt, that the defendant maliciously, feloniously and unlawfully killed the deceased, is erroneous in not limiting the instruction to murder in the second degree. (p. 329.)

10. SAME.

Where one, upon an indictment for murder, relies upon accidental killing as a defense, and there is evidence tending in an appreciable degree, to establish such defense, it is error to refuse to instruct the jury that if they believe from the evidence that the killing was the result of an accident, they should find the defendant not guilty. (p. 330.)

11. SAME.

On a trial for murder, where the defense is that the killing was accidental, it is error to instruct the jury that they shall find the defendant not guilty if they believe the killing was the result of an accident, unless they further find that the defendant was guilty of criminal carelessness, without instructing as to what constitutes criminal carelessness, and without further qualifying the instruction so as to enable the jury, if they should find the defendant guilty of that offense, to properly fix the degree of crime. (p. 330.)

12. SAME—*Evidence to Support Instructions.*

Where, upon a trial for murder, the defendant relies upon accidental killing as a defense, it is error for the court, when asked to instruct the jury that if they believe from the evidence

that the killing was accidental, and not intentional, they should find the defendant not guilty, to refuse to do so; and it is also error for the court to modify such instruction so offered so as to present a theory of the case to them, when there is no evidence, or, if any, when it does not tend, in an appreciable degree, to support such theory. (p. 330.)

Error to Circuit Court, Clay County.

Sarah Ann Legg was convicted of murder and brings error.

Reversed.

HORAN & HORAN and W. E. R. BYRNE, for plaintiff in error.

C. W. MAY, Attorney General for the State.

SANDERS, JUDGE:

This writ of error is to a judgment of the circuit court of Clay county, convicting the defendant, Sarah Ann Legg, of the murder of her husband, Jay Legg, and sentencing her to be hanged.

The Attorney General asserts that the evidence is not made a part of the record by proper bill of exceptions, and relies upon *Tracy's Admx.* v. *Carver Coal Co.*, 57 W. Va. 587; *Dudley* v. *Barrett*, 52 S. E. R. 100; *Ry. Co.* v. *Joyce*, 52 S. E. R. 498, and *Parr* v. *Currence*, 52 S. E. R. 496, to support this contention. The rule announced in these cases has no bearing upon the case under consideration. There it was held that the evidence had not been made a part of the record. In *Tracy's Admx.* v. *Coal Co.*, a skeleton bill of exceptions was used for the purpose of certifying the evidence and making it a part of the record, with parenthetical instructions to the clerk to insert stenographer's transcript of evidence. It did not even appear that the evidence had been transcribed by the stenographer, and if not, it could not not have been certified by the judge, as required. By section 9, chapter 131, Code 1899, it is provided that a party may except to any action or opinion of the court, and tender a bill of exceptions, and if the action or opinion of the court be upon any question involving the evidence, or any part thereof, the court shall certify all the evidence touching such question, and the judge shall sign any

such bill of exceptions, and it shall be made a part of the record. The judge cannot certify evidence which is not written out and before him at the time, so as to comply with the requirement of the statute. Also, in that case, the stenographer's transcript of the evidence bore no mark or memorandum to which reference was made, by which it could be safely identified as the evidence adduced upon the trial. It is not necessary to review the other cases referred to and relied upon, because by consulting them it will be found that they differ widely from the case in hand. The evidence here was certified by the judge, and by a separate bill of exceptions made a part of the record by referring to it as the "certificate of evidence." It is insisted, however, that the bill, in attempting to make the evidence a part of it, says: "Here insert certificate of evidence, which is made part of the record in said case, and a part of this bill of exceptions," and that the bill only attempts to make the certificate a part thereof. The bill calls for and makes a part of it the *certificate of evidence.* What certificate of evidence? The certificate of evidence in the case, to which the bill of exceptions related. The evidence had been certified by the judge, as required by statute; the certificate of evidence showed the style of the case, and that the evidence contained in it was the evidence, and all the evidence, introduced upon the trial, and was signed by the presiding judge. The certificate was self-identifying, as much so as the bill of exceptions itself. Then we have the judge certifying all the evidence, which is, by a separate bill of exceptions, made a part of the record by unmistakable reference thereto.

There are many errors assigned as reasons for reversing the judgment of the circuit court, and awarding the prisoner a new trial, which will be considered in the following order:

I. Complaint is made that the trial judge examined and cross-examined certain witnesses, in such manner as operated prejudicially to the prisoner. The record shows that the judge did examine some of the witnesses at considerable length. Whether such examination was proper or not, and ground for reversal, we are not called upon to determine. In order to demand a review of the action of the trial court in this respect, there should have been an objection to the exam-

ination, and if overruled, proper exceptions taken. There was no objection made to the examination by the judge, except to one question, and we cannot say that the asking of this single question was prejudicial to the prisoner. Nor does it appear that the court was asked to set aside the verdict upon this ground. Where the action of the trial court is sought to be reviewed upon the ground that improper questions were asked witnesses, or that the judge, in examining such witnesses, did so in an improper manner, there should be an objection and exception to such course.

II. It is insisted that certain evidence was improperly admitted over the objection of the defendant. Pat Butler, who had been a witness upon the preliminary examination of the accused, and whose evidence had, upon such examination, been reduced to writing, also testified upon the trial. It appears that this witness was at the home of the defendant immediately after the shooting, and after having stated, upon his examination as a witness upon the trial of this case, that while there he had overheard a conversation between the defendant and Willis Ashley, in which the defendant stated that the shooting was an accident, he was asked what else, if anything, was said in the conversation, to which he replied, "I can't recall the language." He was then asked if he could recall any of the conversation, and his response was, "I don't believe I can." Then it was inquired of him if he had not given evidence upon the preliminary examination of the accused, and after having stated that he had, he was asked if he remembered a question propounded to him on cross-examination, and the answer he had given. The answer which it was claimed he had made to such question was read to him, in the presence of the jury, which is as follows: "She said that he come in and told her to get the gun for him and she went and got it, and I don't remember which one asked whether it was loaded, anyway she said it was loaded, and he said it was not, and they repeated it two or three times, and he told her to snap it, and she snapped it, and it went off." He replied, "Yes,sir, I remember that." And then he was asked if he heard the defendant there, at that time, tell how the killing occurred, to which he answered, "Yes, sir." Then he was interrogated as to how she said it occurred, and he replied, "Well, she said that he came in and called for the gun,

and she got the gun and one of them said it was loaded, I don't remember which one, and the other said it was not, and they repeated that two or three times, and then he told her to snap the gun, and she snapped it, and it went off." The question we have to determine is whether or not it was proper to read to the witness his answer given upon the preliminary examination, for the purpose of stimulating and reviving his recollection.

"It is today generally understood that there are two sorts of recollection which are properly available for a witness,—past recollection and present recollection. In the latter and usual sort, the witness either has a sufficiently clear recollection, or can summon it and make it distinct and actual, if he can stimulate and refresh it, and the chief question is as to the propriety of certain means of stimulating it,—in particular, of using written or printed notes, memoranda, or other things as refreshing it. In the former sort, the witness is totally lacking in present recollection and cannot revive it by stimulation, but there was a time when he did have a sufficient recollection and when it was recorded, so that he can adopt this record of his then existing recollection and use it as sufficiently representing the tenor of his knowledge on the subject. This use of a past recollection depends of course on certain conditions; while the stimulation of an actual present recollection need be subject to no fixed rules; and it is through the improper application of the limitations of the one case to the other that some confusion of decisions has arisen." 1 Greenleaf on Ev., (16th Ed.), sec. 439a; 1 Wigmore on Ev., secs. 734, 738.

It will be necessary to know whether or not the answer read to the witness, and which was given upon the preliminary examination was used to revive a present recollection, or whether it was employed as the past recollection of the witness, because there are certain fixed rules regulating the use of a past recollection which do not apply to the use of a writing for the purpose of refreshing a present recollection. We will not here attempt, however, to discuss the rules applicable to the use of a past recollection, except in so far as is necessary in dealing with the question under consideration. The situation as to past recollection is where a witness is devoid of a present recollection, and desires to use a past rec-

ollection. The witness, upon a perusal of the record or memorandum of a fact or transaction, may not be able to call to mind and testify to an existing knowledge of the fact, independent of the memorandum or writing. The writing fails to refresh and revive the recollection, and thus constitute a present knowledge. So if the witness testifies that at or about the time the memorandum was made, he knew its contents, and knew them to be true, this legalizes and lets in both the testimony of the witness and the memorandum. "If by verifying and adopting the record of past recollection the witness makes it usable testimony, and if by this verification alone can it become so usable, it follows that the record thus adopted becomes to that extent the embodiment of the witness' testimony. Thus, *the record, verified and adopted, becomes a present evidentiary statement of the witness; and as such it may be handed or shown to the jury by the party offering it.* * * * A few decisions declare that the writing is not 'independent evidence' or 'in itself evidence,' but this is to be construed as meaning merely—what no one could deny—that without being verified and adopted it is without standing. A few others expressly refuse to allow it to be 'read in evidence' or 'given in evidence.' But these must be regarded as unsound in principle." 1 Wigmore on Ev., sec. 754.

In *Moots* v. *State*, 21 Ohio St. 653, it is said: "The entry in the book and the oath of the witness supplement each other. The book was really a part of the oath, and therefore admissible with it in evidence."

Also, in *Howard* v. *McDonough*, 77 N. Y. 592, it was held that after the witness has testified, the memorandum which he has used may be put in evidence,—not as proving anything of itself, but as a detailed statement of the items testified to by the witness.

Judge Cooley, in *Mason* v. *Phelps*, 48 Mich. 126, said: "After she had testified that she knew it to be correct, she might have read the entries or repeated them as her evidence. Showing the book was no more than this."

It is held in *Bryan* v. *Moring*, 94 N. C. 687: "The memorandum thus supported and identified becomes part of the testimony of the witness, just as if without it the witness had

orally repeated the words from memory." 1 Greenleaf on Ev., (16th Ed.), section 439*b*.

The witness, in proceeding to testify from a present or existing recollection, may be unable to do so by unaided mental effort. But by resort to some memorandum or writing, his memory may be so stimulated and refreshed as to enable him to recollect the fact, and where this is so, it is not proper to introduce the writing in evidence, or read it in the presence of the jury, because it forms no part of the testimony, being used only for the purpose of aiding the mental effort of the witness to recollect the particular transaction. "But since, in Lord Ellenborough's words, 'It is not the memorandum that is the evidence, but the recollection of the witness,' the party whose witness uses it has no right to have it read or handed to the jury; it is only the opponent who wishes to do this in case he wishes to cast doubt on the reality of the refreshment of memory." 1 Greenleaf on Ev., (16th Ed.), section 439*c*.

Wigmore on Evidence, section 763, in speaking of a writing used to revive a present recollection of a witness, says: "It follows from the nature and purpose for which the paper is used, that it is in no sense testimony. In this respect it differs from a record of past recollection, which is adopted by the witness as the embodiment of his testimony and, as thus adopted, becomes his present evidence and is presentable to the jury. Nevertheless, though the witness' party may not present it as evidence, the same reason of precaution which allows the opponent to examine it allows him to call the jury's attention to its features, and also allows the jurymen, if they please, to examine it for the same end. In short, the opponent, but not the offering party, has a right to have the jury see it."

It is held in *Gregory* v. *Taverner*, 6 C. & P. 281: "The memorandum itself is not evidence, and particular entries only are used by the witness to refresh his memory. * * * The defendant's counsel may cross-examine on the entries already referred to, and the jury may also see those entries if they wish to do so."

In *Com.* v. *Jeffs*, 132 Mass. 5: "The opposite party is entitled to cross-examine the witness in regard to it; and it may be shown to the jury; not for the purpose of establishing the

facts therein contained, but for the purpose of showing that it could not properly refresh the memory of the witness."

This doctrine gives to the defendant the right to cross-examine as to such paper, and also, if he desires, to introduce it to the jury, to show that the memory of the witness could not thereby be revived, but does not give to the party who uses it for the purpose of refreshing the memory of the witness, the right to introduce it in evidence.

Having shown that a writing or memorandum used to refresh a present recollection cannot be read to the witness nor introduced to the jury, we have only to inquire, was the answer of the witness given upon the preliminary examination used to revive a present recollection, or was it the use of a past recollection? The witness shows clearly that when the answer was read to him, he remembered the conversation. This he expressly states, and further on in his testimony, in answer to a question as to how the defendant said it occurred, he states, substantially, the facts embodied in the answer read to him. Therefore, it is perfectly apparent that the use of the answer was for the purpose of refreshing the present recollection of the witness, and this being so, and it being read to him in the presence of the jury, we must conclude that it was error to do so.

III. Were the statements of the defendant that are claimed to have been made to R. A. Hamrick, a justice of the peace, admissible? It is claimed that these statements were made upon a legal examination, and, for that reason, were inadmissible. Section 20, chapter 152, Code 1899, provides: "In a criminal prosecution, other than for perjury, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination." In *Hall's Case*, 31 W. Va. 505, it was held error to permit the state, upon the trial of the prisoner, to prove a statement made by him when he was before the justice on his preliminary examination, and in *Kirby's Case*, 77 Va. 681, evidence was admitted to show that the accused had, upon a previous trial, made statements different from his evidence on his second trial, which was held to be error. These cases do not measure up to, and are not decisive of, the question here presented. In those cases there was no question as to the examination being a legal one, but here, while the statements were made,

theory that the killing was intentional, and if there is evidence tending to show this, the state is entitled to an instruction presenting this phase of the case. If the defendant relied upon accidental killing as an excuse, it was proper for her to present this question to the jury, also, and then for the jury to determine, from all the facts and circumstances, as to whether or not the killing was done intentionally and with malice. There is no question but what the defendant killed the deceased, with a deadly weapon. This appearing, the law presumes that it was murder in the second degree. But if from the state's own showing, or from the testimony of the defendant, it appears that the killing was accidental, then the defendant would be excused. But the jury are to determine this fact. It is true that the burden is upon the state to prove the killing, that it was intentional, and with malice. The state offers evidence to prove the killing, with a deadly weapon, which the defendant herself admits, and this being so, how is it to be determined whether or not it was intentionally done? It must be gathered from all the facts and circumstances surrounding the transaction, and it is peculiarly within the province of the jury to determine this, according to the well settled rules of law. And this being so, it is proper for the court to say to the jury that if they believe the homicide was committed with a deadly weapon, and without any or upon slight provocation, that they should find the defendant guilty, unless, from all the other evidence, it appears that it was accidentally done. This is practically what was propounded to the jury in this case. Malice is presumed from the use of a deadly weapon. But if it is shown to have been an accident, this presumption is rebutted. "The defense of accidental and unintentional killing does not preclude the giving of instructions embodying the law relating to any offense charged in the indictment which the evidence tends to prove." *State* v. *Paul Clifford*, 59 W. Va. 1.

It is said that this instruction does not differ in substance and effect from instruction B, given in *Cross' Case*, 42 W. Va. 258. The vice of instruction B, in that case, was that it told the jury if the defendant relied upon the defense of accidental killing, that the burden was upon him to prove such defense, and to avail him, he must establish it by a prepond-

erance of the evidence. Where accidental killing is relied upon as a defense, the accused is not required to prove such defense by a preponderance af the evidence, because there is a denial of intentional killing, and the burden is upon the state to show that it was intentional, and, if, from a consideration of all the evidence, both that for the state and the prisoner, there is a reasonable doubt as to whether or not the killing was accidental, or intentional, the jury should acquit. The court, in giving said instruction B, confounded the doctrine of the law of self-defense with the rules applicable to the defense of accidental killing, as where self defense is relied upon, the burden is upon the accused to prove such defense by a preponderance of the testimony, because the killing is admitted, and it is admitted to have been intentional. Therefore, in order to justify it, the burden is upon the prisoner of showing such a state of facts as warranted his course. But where accidental killing is relied upon, the prisoner admits the killing, but denies that it was intentional. Therefore, the state must show that it was intentional, and it is clearly error to instruct the jury that the defendant must show that it was an accident by a preponderance of the testimony, and instruction B, in the *Cross Case*, was properly held to be erroneous. But it does not control the principle involved in the consideration of the instruction here, and we think there was no error committed in giving it. For the same reasons advanced to show that this instruction was properly given, we think there was no error in giving instructions 7 and 9.

As to instructions Nos. 2, 3, 4 and 5. By these instructions it is undertaken to define reasonable doubt. We see no objection to these instructions as such. They seem to define reasonable doubt correctly, and no objection to their correctness is pointed out. But it is urged that the court erred in giving them, because they are upon the same point, and for the same purpose, and that a continued repetition of instructions upon a single point is calculated to prejudice the defendant. It was entirely unnecesssary to repeat these instructions. It is manifestly improper to do so. The purpose of instructing a jury is to aid them in arriving at a proper verdict, and not to confuse them, and in order to be of aid, instructions should not be repeated, but when onc

given, presenting a particular theory of a case, no other instruction presenting the same theory should be given, because to do so is to destroy the very purpose for which instructions are given, and to mystify and confuse the jury. It is true these instructions present the definition in different language, but there is no necessity for it to be defined more than once. Four long instructions upon reasonable doubt, which has never yet been defined or made clearer than the words themselves import, can certainly be of no service to a jury. The practice of repeating instructions should be condemned. It is wrong to do this, and thereby prominently impress a single feature of a case upon a juror. Either of these instructions would have been sufficient, but as to whether or not the repetition of them is reversible error, we will not determine, because, on other grounds the judgment will have to be reversed, and upon a second trial, the necessity for this criticism can be obviated.

Instruction No. 6 tells the jury that they are the sole judges of the evidence, and that they have the right to believe or refuse to believe any witness, and that upon the credibility of any witness, they may take into consideration his interest in the matter in controversy, the reasonableness or unreasonableness of his statements, his bias or prejudice in the matter, if any appear, and his demeanor upon the witness stand. There is no objection pointed out to this instruction, and we think it was properly given.

VI. The court refused to give instructions 5, 8, 9 and 10, as asked by the defendant, but over her objection modified and gave them.

Instruction No. 5.—"The court instructs the jury that they are the sole judges of the credibility of the witnesses, and they have a right to believe, or not to believe any witness who has testified in the case."

This instruction was modified by adding the words, "but they cannot arbitrarily disregard the testimony of a witness, unless they believe it untrue." Whether this instruction as asked was proper or not is unnecessary to decide, as the court made a very slight modification and then gave it. The action of the court in modifying and giving it was certainly not error.

Instruction No. 8.—"The court instructs the jury that before they could find the defendant guilty of murder, they must believe beyond all reasonable doubt by evidence adduced upon the trial of the case, that the defendant wilfully, maliciously, deliberately, feloniously and unlawfully, killed her husband, Jay Legg."

It is not necessary, in order to find the defendant guilty of murder in the second degree, that the jury believe that she "wilfully, maliciously, deliberately, feloniously and unlawfully" killed her husband, yet this instruction tells them that they must so believe before they can find her guilty of murder, which includes murder in the second degree, and which is charged in the indictment. It would have been clearly misleading to the jury, because it applies to murder of both degrees. To have been proper, it should have been limited to murder in the first degree. Therefore, it was not error to refuse to give it as offered, but the court modified it and gave it in the following form:

Instruction No. 8.—"The court instructs the jury that before they could find the defendant guilty of murder, they must believe beyond all reasonable doubt by evidence adduced upon the trial of the case, that the defendant maliciously, feloniously and unlawfully, killed her husband, Jay Legg."

This modification had the effect of reversing the situation. To have given the instruction as offered would have been error against the state, and as modified it was error against the prisoner. Both murder of the first and second degree are charged in the indictment, and it will not do to tell the jury that before they can convict the prisoner of murder, they must believe that the killing was "maliciously, feloniously and unlawfully" done, because, to have found a verdict of murder in the first degree, as they did find, it was necessary for them to have further believed that the killing was wilful and deliberate. But this instruction, by telling them that before they could find the defendant guilty of murder, they must believe, beyond all reasonable doubt, that the defendant "maliciously, feloniously and unlawfully" killed her husband, practically says to the jury that if they do find it was done "maliciously, feloniously and unlawfully," they could find a verdict of murder in the first degree, which they did find.

Instruction No. 9.—"The court instructs the jury that if they believe from the evidence that Jay Legg was accidentally killed, they should find the defendant not guilty."

Instruction No. 10.—"The court instructs the jury that if they believe from the evidence that Jay Legg instructed his wife, Sarah Ann Legg, the defendant, to hand him his gun, and in accordance with such request, she undertook to get the gun down from the rack to hand him, and it was accidentally discharged, and killed said Jay Legg, then the defendant is not guilty as charged in the indictment."

These instructions properly present to the jury the theory of the defense, that the shooting was accidental, and it was error to refuse to give them. The jury had been instructed upon the state's theory, and it was entirely proper, under the evidence, to tell the jury that if they believed from the evidence that the deceased was accidentally killed, they should find the defendant not guilty. The defendant was entitled to these instructions without any modification. But the court refused to give them as offered, and modified them, so that they read as follows:

Instruction No. 9.—"The court instructs the jury that if they believe from the evidence that Jay Legg was accidentally killed, they should find the defendant not guilty, unless they find that such accident was caused by criminal carelessness upon the part of defendant."

Instruction No. 10.—"The court instructs the jury that if they believe from the evidence that Jay Legg requested his wife, Sarah Ann Legg, to hand him his gun, and in accordance with such request she undertook to get the gun down from the rack to hand him, and it was accidentally discharged and killed the said Jay Legg, without criminal carelessness upon the part of the defendant, then the defendant is not guilty as charged in the indictment."

There is no evidence to justify this modification. There is nothing from which the jury could find criminal carelessness. But suppose there were, the instructions as modified would t be proper. What verdict would the jury find, if they uld believe the defendant guilty of criminal carelessness? se instructions do not say. They are told that they should the defendant not guilty, if they believe the killing was dental, unless they further believe that she was guilty of

criminal carelessness. Under the instruction, they might find her guilty of murder in the first degree, which could not be done. Criminal carelessness will not support such a verdict. "One killing another by the mere careless use of a deadly weapon commits only manslaughter." Bishop Crim. Law, vol. 2, sec. 681. And, again, the jury are left to determine what constitutes criminal carelessness, without any instruction upon this point. The question as to what is criminal carelessness is a question of law for the court. The jury are to determine the facts, and the court is to say whether or not these facts are such as to constitute criminal carelessness.

It is charged that the verdict is contrary to the evidence, but, as the judgment is reversed for other reasons, and the case will be re-tried, it is not proper to express any opinion upon the facts.

The judgment of the circuit court is reversed, and a new trial awarded the defendant.

Reversed.

CHARLESTON

STATE v. MAYO.

Submitted February 28, 1906. Decided April 10, 1906.

1. INTOXICATING LIQUORS—*Illegal Sale—Indictment.*

   In an indictment under sections 16 and 17, chapter 32, Code 1899, for selling intoxicating drinks to a minor, it is not sufficient to charge that the sale was made by a certain named person for the defendant. The indictment should charge that the sale was made by the defendant. (p. 332.)

Error to Circuit Court, Randolph County.

Lem Mayo for M. Stalnaker was convicted of illegal sale of liquors, and brings error.

Reversed. Indictment dismissed.

JARED L. WAMSLEY, for plaintiff in error.

C. W. MAY, Attorney General, for the State.

SANDERS, JUDGE:

This is a writ of error to a judgment of the circuit court of Randolph county, convicting the defendant, M. Stalnaker, of a misdemeanor. The defendant appeared and moved to quash the indictment against her, which motion was overruled, and which is assigned as error. The indictment is in the following form:

"The grand jurors of the State of West Virginia, in and for the body of the said county of Randolph, and now attending the said court, upon their oaths present that Lem Mayo for M. Stalnaker on the —— day of January, 1901, within one year next preceding the finding of this indictment, in the county aforesaid, she the said M. Stalnaker having then and there a state license to sell spirituous liquors, wine, porter, ale, beer, and other intoxicating drink, he the said Lem Mayo did at M. Stalnaker's place of business and on premises under her control, in the town of South Elkins, in said county, then and there unlawfully and in violation of the conditions of M. Stalnaker's license bond sell and give away to one Charlie Stalnaker, a minor, intoxicating drink, and he the said Lem Mayo then and there knowing and having reason to believe that the said Charlie Stalnaker was then and there a minor under 21 years of age, against the peace and dignity of the State."

Should the court have sustained the motion to quash the indictment? By section 16 of chapter 32 of the Code it is provided that if any person having a state license to sell spirituous liquors shall sell or give away any such liquors or drinks to a minor, he shall be guilty of a misdemeanor, and section 17 of the same chapter says: "A sale of any such liquors or drink by one person for another shall, in any prosecution for such sale, be taken and deemed as a sale by both, and both may be indicted and fined therefor, either jointly or separately." By this section it is made immaterial whether the sale is by the person having the license, or by some one acting for such person—still the person having the license would be liable. Therefore, if the defendant had a state license, as charged in the indictment, to sell spirituous liquors, and Lem Mayo, acting as her agent, made the sale to a minor, when at the time he had reason to believe such person to be a minor, the defendant would be liable, but there should be a

charge in the indictment that the sale was made by her. There is no charge in the indictment against the defendant. She is not accused of any offense. The indictment charges that the sale was made by Lem Mayo for the defendant. This does not constitute a charge against her. If the allegations of the indictment be true, an indictment could be found against her, charging her with making the sale, and if upon the proof it were shown that the sale was made for her, she could be found guilty, yet there must be a specific and direct charge against her. It will not do to simply charge the agent with making the sale for her. To hold such an indictment good as to the defendant, would be a plain violation of criminal pleading.

The court erred in refusing to quash the indictment as to M. Stalnaker. We reverse the judgment, sustain the motion to quash as to M. Stalnaker, dismiss the indictment as to her, and discharge her from further prosecution thereunder.

Reversed. Indictment Dismissed.

BRANNON, JUDGE, (*dissenting*):

I am not willing to *quash* the indictment. It says that "Lem Mayo for M. Stalnaker" sold to a minor. If those quoted words are true both defendants are guilty, by the very letter of the statute. If one for another sell or give a minor liquor both are guilty. It is generally enough to charge an offense in the words of the statute. I had some question whether the indictment ought not to amplify the words of the statute by saying to the effect that Mayo as agent of Stalnaker, and by her direction and procurement, gave the liquor to the minor; but that little word "for" would compel the State to prove such agency to convict Mayo, and therefore I do not think such enlargement on the words of the statute necessary; not necessary for notice, nor as descriptive of the offense. If Mayo for Stalnaker gave the liquor, both are guilty by the words of the statute. What more does the indictment need? It is an indictment against both.

CHARLESTON

59 334
60 348

COLUMBIA FINANCE & TRUST CO. *v.* FIERBAUGH, *et al.*

Submitted January 30, 1906. Decided April 10, 1906.

1. EQUITY—*Pleading.*
   A pleading in equity is taken to be what it is in substance, regardless of its form, or the name given to it by the pleader. (p. 337.)

2. ACTION—*Commencement of Suit.*
   A suit in equity is commenced at the time process to answer the plaintiff's bill is issued, although the bill be not then filed. The bill, when filed, relates back to the time the process was issued. (p. 337.)

3. TAXATION—*Tax Sale—Suit to Set Aside—Burden of Proof.*
   Where the validity of a sale of land for delinquent taxes is attacked by proper suit in equity to set the sale aside, before deed to the purchaser is made and recorded, for material irregularities and failures to comply with material provisions of the statutes in relation to the proceedings leading up to and including the sale, and the existence of such irregularities and failures is put in issue between the plaintiff and such purchaser, a defendant, by proper pleadings in the cause, the burden is on such purchaser claiming under the tax sale to show substantial compliance with all the material provisions of the statutes in relation to the proceedings leading up to and including the sale. (p. 338.)

4. SAME.
   The rule above stated is not changed by the fact that a deed to such purchaser is recorded pending the suit. (p. 338.)

Appeal from Circuit Court, Putnam County.

Action by the Columbia Finance & Trust Company against Robert S. Fierbaugh and others. Decree for plaintiffs, and defendant E. W. Wick appeals.

Affirmed.

GUNN & ALEXANDER, for appellant.
BOWYER & GREEN, for appellees.

COX, JUDGE:

The Columbia Finance & Trust Company, a corporation, instituted its suit in equity in the circuit court of Putnam county against Sarah Fierbaugh aud others, and filed its bill therein at July rules, 1899, for the purpose of foreclosing a

mortgage lien against a certain tract of land in said county, then owned by Sarah Fierbaugh, which lien the Trust Co. claimed as assignee of the Columbia Building, Loan & Savings Association, also a corporation. The bill filed set up a trust lien against the land, in favor of the administrator of Wm. Collins, deceased, and made such administrator and the trustee in the deed of trust parties defendant. Such proceedings were had in the suit that on the 29th day of July, 1901, a decree for the sale of the land was entered to satisfy said liens.

In December, 1899, the land was sold by the sheriff of Putnam county for taxes assessed thereon and returned delinquent for the year 1898 in the name of Sarah Fierbaugh. E. W. Wick became the purchaser at the tax sale for $12.12. Afterwards, on the 3rd day of August, 1901, the Trust Co. caused process to be issued against the parties defendant to the original bill and E. W. Wick, the purchaser at the tax sale, to answer an amended and supplemental bill to be filed by the Trust Co. This bill was filed at December rules, 1901. It alleged the ownership of the land sold for taxes to be in Sarah Fierbaugh, and exhibited her title papers. It also alleged various irregularities and failures to comply with material provisions of the statutes, in relation to the proceedings whereby the land was sold for taxes, and in relation to the sale, and other proper matters, and asked to set aside the tax sale and deed made pursuant thereto. Wick, the purchaser at the tax sale, demurred to and answered this bill. Upon the hearing, the circuit court entered a decree setting aside the tax sale and the deed made pursuant thereto, and carrying into effect the former decree of sale to satisfy the liens against the land. Wick appeals.

The principal controversy in this cause is, whether or not the curative provision of our statute, sec. 25 ch. 31, Code, applies to the irregularities and failures alleged in the bill, under the circumstances here presented. The solution of this controversy depends upon the time when the deed to the tax purchaser was admitted to record. The date of the admission of this deed to record is also controverted. The certificate of the clerk of the county court of Putnam county of the admission of this deed to record is dated the 5th day of August, 1901, and certifies that the deed, together with the sheriff's

receipt, acknowledgment, etc., were on that day presented and admitted to record. By an amended answer, appellant alleged that the deed was executed and delivered to him on the 29th of January, 1901, and was on that day delivered to said clerk for record, and that the clerk incorrectly and by mistake certified on the deed that it was presented and recorded on the 5th of August, 1901. To this amended answer, and to the original answer, there were general replications.

The evidence upon the issue made, as to the date when the deed was admitted to record, is conflicting. The certificate made by the clerk, under the sanctity of his official oath, says that the deed was admitted to record on the 5th of August, 1901. Appellant Wick testified that the deed was executed, stamped and directed to be recorded on the 29th day of January, 1901, and that the stamps thereon were cancelled on that day. The evidence of the notary who took the acknowledgment to the deed on the 29th of January, 1901, was taken on behalf of the appellant. He testified that he took the acknowledgment. He was not asked, and he did not say, whether the stamps were placed on the deed and cancelled at the time he took the acknowledgment or not. The evidence of the clerk of the county court, who made the certificate of the admission of this deed to record, was taken on behalf of the appellant. So far as his evidence in any way tends to contradict his official certificate, it must be looked upon with suspicion. This witness testified that he could not remember when the stamps were placed on the deed. His attention was called to the date of his certificate, and he further testified that "the deed had been executed and acknowledged and stamped before the date of the certificate of record, and I had received instructions from Mr. Wick to place it to record, and it was continually in the office from the time of execution until I delivered it to Mr. Wick some time after recording." He did not say whether the deed was ready for record one minute, one hour, one month, or longer, before the date of the certificate. He also testified that this deed was kept with the other unrecorded deeds in his office—meaning by other "unrecorded deeds" those which had been admitted to record but not yet transcribed on the deed book. He did not say that he made any mistake or error in the date of the certificate. We do not consider that the evidence ad-

duced from this witness in any manner contradicted his official certificate.

A number of witnesses testified that they went to the clerk's office on different occasions between the 29th of January, 1901, and the 5th of August, 1901, and searched for this deed, although some of them did not disclose to the clerk the fact that the object of their search was this deed. Some of these witnesses testified that they asked the clerk for the unrecorded deeds in his office; that the unrecorded deeds were delivered to them by the clerk; that the unrecorded deeds were examined by them, and that the deed to Wick was not found among the unrecorded deeds. Some of these witnesses testified that the clerk was asked for this particular deed, and that he said "there was none." It is true there is a conflict between the evidence of the clerk and one of these witnesses as to whether or not this deed was shown to him.

The decree of the lower court in effect defeated the contention of the appellant as to the date of the admission of this deed to record. Under all the facts and circumstances appearing in this record, and under the rule of law applicable, we cannot say that the lower court erred in its determination of this question of fact. This being true, it is unnecessary for us to discuss or decide whether or not the clerk's certificate may be impeached, in a collateral proceeding in equity, for mere error in date of admission to record; because the facts presented do not call for such adjudication.

Considering the 5th day of August, 1901, as the date of the admission of this deed to record, the process to answer the amended and supplemental bill was issued two days previous. The amended and supplemental bill was in effect a new suit, in so far as its purpose was to litigate the validity of the tax sale and deed. A pleading in equity is taken for what it is in substance, regardless of its form, or the name given to it by the pleader. *Sturm* v. *Fleming*, 22 W. Va. 404; *Mayo* v. *Marchie*, 3 Munf. 384; *Kendrick* v. *Whitney*, 28 Grat. 646; *Hill* v. *Bowyer*, 18 Grat. 364; *Laidley* v. *Merrifield*, 7 Leigh 346; *Mettert* v. *Hagan*, 18 Grat. 231; *Sands* v. *Lynham*, 27 Grat. 291. The amended and supplemental bill was not actually filed until after the tax deed had been recorded; but, when filed, the bill related back to the time the process to answer it was issued. The issuance of process to answer

the plaintiff's bill is the commencement of a suit in equity. *Geiser Mfg. Co.* v. *Chewning*, 52 W. Va. 523; *U. S. Blow Pipe Co.* v. *Spencer*, 46 W. Va. 590.

This bill, in addition to alleging the ownership of the land to be in Sarah Fierbaugh, and the irregularities and failures to comply with the provisions of the statutes, made the followlowing allegation: "That before the institution of these proceedings to attack said sale and to have same declared null, and before the issuance of the process on this amended bill, the plaintiff caused to be tendered to said E. W. Wick the purchase money paid by him at said pretended sale and purchase for said tract of land, said plaintiff having a right to charge it with the payment of its debt, together with interest allowed by law, and any further taxes he may have paid on the same, which tender and money he refused and refused to abandon his claim as purchaser of said land, or to allow the same to be released from said pretended sale, or to be redeemed in any way therefrom. Said offer or tender has been kept good, and plaintiff now makes the same offer." This allegation was not denied, but admitted, by the answer of appellant. The bill also alleged the admission of the tax deed to record after process was issued to answer the amended and supplemental bill, and other proper matters. The answer of appellant denied the existence of the irregularities and failures to comply with the provisions of the statutes, in relation to the proceedings leading up to and including the sale, to which answer the plaintiff replied generally. Under this state of the pleadings, the burden was on the appellant, claiming under this tax sale, to show substantial compliance with all the material provisions of the statutes in relation to the proceedings leading up to and including the tax sale. 2 Cooley on Taxation, 914-16; Black on Tax Tit. (2d ed.), 443; Blackwell on Tax Tit., § 1125; *Nalle* v. *Fenwick*, 4 Rand 585; *Allen* v. *Smith*, 1 Leigh 231; *Chapman* v. *Bennett*, 2 Leigh 329; *Yancey* v. *Hopkins*, 1 Munf. 419; *Christy* v. *Minor*, 4 Munf. 431; *Jesse* v. *Preston*, 5 Grat. 120; *Flanagan* v. *Grimmet*, 10 Grat. 425; *Dequasie* v. *Harris*, 16 W. Va. 345; *Stead's Exor.* v. *Crouse*, 4 Cranch 403; *Parker* v. *Rule's Lessee*, 9 Cranch 64; *Williams* v. *Peyton's Lessee*, 4 Wheat. 77; *Ronkendorff* v. *Taylor's Lessee*, 4 Pet. 349; *Early* v. *Harmon*, 18 How. 610.

The fact that the tax deed was recorded after the process

was issued does not change the rule as to the burden of proof. The rights of the parties must be determined as of the commencement of the suit. This being an attack upon the tax sale before deed recorded, the curative provision of the statute, sec. 25 ch. 31, Code, cannot apply to the proceedings leading up to and including the tax sale. *Boggess* v. *Scott*, 48 W. Va. 316; *Hays* v. *Heatherly*, 36 W. Va. 613; *Jackson* v. *Kittle*, 34 W. Va. 207.

The irregularities and failures alleged in the amended and supplemental bill are sufficient, at common law, to set aside the tax sale. The mention of a few of such irregularities and failures will serve to illustrate. The bill alleged that the sheriff did not, within ten days after receiving from the Auditor the list of lands to be sold by him for delinquent taxes for the year 1898, make out and cause to be published an abstract of such list, in some weekly newspaper published in said county, once a week for four successive weeks prior to the date of sale; that the sheriff did not at such sale sell the said lands at the front door of the court house of said county, and that no copy of the delinquent list for the year 1898, including said tract of land, was posted at the front door of the court house at least two weeks before the session of the county court at which the sheriff presented his delinquent list for the taxes of 1898. These irregularities and failures are fatal to the tax sale before deed recorded. Notwithstanding the bill pointed out these material irregularities and failures, the appellant contented himself with the simple denial of their existence and of their materiality, when he carried the burden of showing a substantial compliance with all the material provisions of the statutes in relation to the preceedings leading up to and including the sale. The appellant offered no evidence to show compliance with the provisions of the statutes. We must hold, therefore, that he has failed to make out a defense to the plaintiff's amended and supplemental bill.

We have not discussed the demurrer to the amended and supplemental bill separately; because it seems entirely sufficient in law, if treated as a bill attacking the tax sale before deed recorded.

For the reasons stated, the decree of the circuit court is affirmed.

Affirmed.

Instruction No. 9.—"The court instructs the jury that if they believe from the evidence that Jay Legg was accidentally killed, they should find the defendant not guilty."

Instruction No. 10.—"The court instructs the jury that if they believe from the evidence that Jay Legg instructed his wife, Sarah Ann Legg, the defendant, to hand him his gun, and in accordance with such request, she undertook to get the gun down from the rack to hand him, and it was accidentally discharged, and killed said Jay Legg, then the defendant is not guilty as charged in the indictment."

These instructions properly present to the jury the theory of the defense, that the shooting was accidental, and it was error to refuse to give them. The jury had been instructed upon the state's theory, and it was entirely proper, under the evidence, to tell the jury that if they believed from the evidence that the deceased was accidentally killed, they should find the defendant not guilty. The defendant was entitled to these instructions without any modification. But the court refused to give them as offered, and modified them, so that they read as follows:

Instruction No. 9.—"The court instructs the jury that if they believe from the evidence that Jay Legg was accidentally killed, they should find the defendant not guilty, unless they find that such accident was caused by criminal carelessness upon the part of defendant."

Instruction No. 10.—"The court instructs the jury that if they believe from the evidence that Jay Legg requested his wife, Sarah Ann Legg, to hand him his gun, and in accordance with such request she undertook to get the gun down from the rack to hand him, and it was accidentally discharged and killed the said Jay Legg, without criminal carelessness upon the part of the defendant, then the defendant is not guilty as charged in the indictment."

There is no evidence to justify this modification. There is nothing from which the jury could find criminal carelessness. But suppose there were, the instructions as modified would not be proper. What verdict would the jury find, if they should believe the defendant guilty of criminal carelessness? These instructions do not say. They are told that they should find the defendant not guilty, if they believe the killing was accidental, unless they further believe that she was guilty of

criminal carelessness. Under the instruction, they might find her guilty of murder in the first degree, which could not be done. Criminal carelessness will not support such a verdict. "One killing another by the mere careless use of a deadly weapon commits only manslaughter." Bishop Crim. Law, vol. 2, sec. 681. And, again, the jury are left to determine what constitutes criminal carelessness, without any instruction upon this point. The question as to what is criminal carelessness is a question of law for the court. The jury are to determine the facts, and the court is to say whether or not these facts are such as to constitute criminal carelessness.

It is charged that the verdict is contrary to the evidence, but, as the judgment is reversed for other reasons, and the case will be re-tried, it is not proper to express any opinion upon the facts.

The judgment of the circuit court is reversed, and a new trial awarded the defendant.

Reversed.

CHARLESTON

STATE v. MAYO.

Submitted February 28, 1906. Decided April 10, 1906.

1. INTOXICATING LIQUORS—*Illegal Sale—Indictment.*

In an indictment under sections 16 and 17, chapter 32, Code 1899, for selling intoxicating drinks to a minor, it is not sufficient to charge that the sale was made by a certain named person for the defendant. The indictment should charge that the sale was made by the defendant. (p. 332.)

Error to Circuit Court, Randolph County.

Lem Mayo for M. Stalnaker was convicted of illegal sale of liquors, and brings error.

Reversed. Indictment dismissed.

JARED L. WAMSLEY, for plaintiff in error.

C. W. MAY, Attorney General, for the State.

show possession somewhere on the land conveyed to her, but not actual possession of the strip which she seeks to recover, unless actual possession of some other part of the land may be extended to the strip because it is within the boundary of her grant and without the boundaries of the excluded parcels.

The burden was on the plaintiff to locate the outer boundary of her grant, and to locate the boundaries of the excluded parcels, and to show that the land she seeks to recover from the defendant is within the outer boundary of her grant and without the boundaries of the excluded parcels. This is the settled law of this State. *Bryan* v. *Willard*, 21 W. Va. 65; *Stockton* v. *Morris*, 39 W. Va. 432; *Buck* v. *Newberry*, 55 W. Va. 681. Since the decison of the case of *Stockton* v. *Morris*, this doctrine has been fully established in Virginia, by numerous decisions of the court of last resort of that state. See *Harman* v. *Stearns*, 95 Va. 58; *Kimbal & Fink* v. *Carter*, 95 Va. 77; *Reusens* v. *Lawson*, 91 Va. 226; *Va. Coal & Iron Co.* v. *Keystone Coal & Iron Co.*, 101 Va. 723. The same doctrine has been laid down by the Supreme Court of the United States, in *Maxwell Land Grant Co.* v. *Dawson*, 151 U. S. 586; *Corinne Mill Co.* v. *Johnson*, 156 U. S. 574; *Hawkins* v. *Barney's Lessee*, 5 Pet. 457; and other cases. See, also, *Webb* v. *Phillips*, 80 Fed. Rep. 954.

The plaintiff, having failed to locate the land which she seeks to recover within the outer boundary of her grant and without the boundaries of the excluded parcels, is not entitled to recover, and the judgment of the circuit court must be affirmed.

Affirmed.

CHARLESTON

DEEPWATER COUNCIL, ETC. v. RENICK.

59 343
60 278

Submitted February 14, 1906. Decided April 10, 1906.

1. CORPORATIONS—*Sale of Realty—Validity.*

A corporation, duly incorporated under the provisions of chapter 55 of the Code, may sell real estate owned and held by it in its corporate name, without resort to a court proceeding under section 9 of chapter 57 of the Code. (p. 346.)

2. SAME—*Deed—Validity.*

A deed, which is not *ultra vires* as to a corporation, and which is executed in its corporate name and under its corporate seal, by its proper officers, and duly delivered, carries with it the presumption of authority in such officers to execute it and affix thereto the seal of the corporation. (p. 347.)

3. DEEDS—*Fraud—Evidence.*

When actual fraud is relied on to set aside a deed, the fraud must be clearly proved. This may be done by direct or by circumstantial evidence, or by both. (p. 348.)

4. FRAUD—*Evidence.*

Actual fraud cannot be established alone by proof of circumstances raising only a suspicion of fraud, but the evidence and circumstances must be of such character as to clearly establish such fraud. (p. 350.)

5. CONTRACTS—*Cancellation—Inadequacy of Consideration.*

Where parties, competent to contract, enter into a contract, it will not be set aside in a court of equity on the ground of inadequacy of consideration, unless the inadequacy be so gross as to shock the conscience and to amount to proof of fraud. Courts of equity, as well as courts of law, act upon the ground that every person who is not, from his peculiar condition of circumstances, under disability, if entitled to dispose of his property in such manner and upon such terms as he pleases; and whether his bargains are wise, discreet and profitable, or otherwise, are considerations not for courts of justice, but for the party himself, to deliberate upon. (p. 350.)

6. FRAUD—*Evidence—Inadequate Consideration.*

Inadequacy of consideration, although not so gross as to shock the conscience and amount to proof of fraud, may nevertheless be considered with other evidence or circumstances in determining the question of fraud. (p. 351.)

Appeal from Circuit Court, Fayette County.

Bill by the Deepwater Council, No 40, O. U. A. M. of Mt.

Carbon, against J. E. Renick. Judgment for defendant, and plaintiff appeals.

Affirmed.

DILLON & NUCKOLLS, for appellant.

PAYNE & HAMILTON and BROWN, JACKSON & KNIGHT, for appellee.

COX, JUDGE:

On the 20th day of February, 1903, a deed, purporting to convey a certain lot of land near Mount Carbon in Fayette county, was made and executed in the name of Deepwater Council No. 40, Order United American Mechanics of Mount Carbon, and under its corporate seal, by F. M. Bone, its councilor, and John Nichols, its secretary, and delivered to J. E. Renick, the grantee named therein, and duly admitted to record on the 24th of February, 1903. Deepwater Council No. 40, Order United American Mechanics of Mount Carbon, is a corporation, duly incorporated under the provisions of chapter 55 of the Code, and, for convenience, will be hereafter referred to as the "Lodge." On the first day of June, 1903, the Lodge instituted this suit in equity, in the circuit court of Fayette county, against J. E. Renick, to set aside said deed upon two grounds: first, want of authority on the part of Bone and Nichols, officers of the Lodge, to make the deed; second, actual fraud in the procurement of the deed. The bill alleged willingness on the part of the Lodge to return the purchase money paid by Renick. Renick, by answer, denied substantially all the material allegations of the bill in relation to want of authority on the part of the officers making the deed, and in relation to actual fraud in its procurement. Many depositions were taken. Upon final hearing, the circuit court of Fayette county entered a decree dismissing the plaintiff's bill. From this decree the Lodge appealed.

The deed did not purport to convey all the property of the Lodge, and thus practically terminate its existence, but only a specific parcel of real estate. The act of conveying this real estate was not *ultra vires*, so far as the Lodge was concerned, if the act was in fact the act of the Lodge; because the very purpose of such corporation, as expressed in the act under which it was incorporated, is to "hold, lease, sell and convey real property," etc. Section 2, chapter 55, Code.

Section 8 of said chapter provides that such a corporation may make and adopt all necessary by-laws and regulations, not inconsistent with the Constitution and laws of the United States and of this State, to enable it to conduct and pursue its business and purpose; and that, except where it is otherwise provided, such corporation shall be subject to, and governed by, chapters 52, 53 and 54 of the Code. These chapters relate to joint stock companies.

Section 42, chapter 53, Code, provides that the number of stockholders, or amount of stock, necessary to constitute a quorum at a meeting of the stockholders, and the mode of transacting business at such meeting, may be prescribed by the by-laws.

Section 49, chapter 53, Code, provides that there shall be a board of directors for every corporation subject to that chapter, who shall have power to do, or cause to be done, all things that are proper to be done by the corporation; and that a majority of the board shall constitute a quorum, unless otherwise provided in the by-laws.

Section 55, chapter 53, Code, provides that the board of directors, in the exercise of their powers, shall be subject to such by-laws and regulations, not inconsistent with the laws of this State, as the stockholders may pass from time to time in general meeting.

These provisions of the statutes in relation to joint stock companies, govern the Lodge, so far as applicable to it.

Usually the members of a Lodge are not, in a strict sense, stockholders of the corporation. They have no stock which they may assign to others. They are simply members, and as such entitled to participate in the business of the corporation, in many respects in like manner as stockholders in a joint stock company, except that such members stand on an equality as to each other. They are entitled to a voice in the proceedings as individual members, and not according to the amount of stock held by them, as in joint stock companies.

We shall discuss the grounds alleged for setting aside this deed, in the order named; first, want of authority in the officers to make the deed. Under this ground, it is contended that the real estate of the Lodge could not be sold, without

resort to a court proceeding under section 9, chapter 57, Code. In our judgment, this section does not apply. At the time the deed mentioned was made, this real estate was owned and held by the Lodge in its corporate name, and not by a trustee or trustees for its use. Said section 9 provides for a sale by order of court, upon the application of a board of trustees holding the property sought to be sold. Under section 6 of that chapter, the trustees mentioned in section 3 of the same chapter are made a corporation. It seems clear to us that section 9 does not refer to or include an active corporation chartered under chapter 55, authorized and competent to transact its own business without the intervention of trustees or of a court order.

It is contended that the officers who made the deed were without authority, because that authority had not been conferred upon them by a proper meeting of the members of the Lodge or by its board of directors.

The deed is regular upon its face, under seal of the Lodge, signed and acknowledged by its chief officers, delivered to the grantee, and by him caused to be recorded. Under these circumstances, authority on the part of these officers to make the deed will be presumed, and the burden is on the Lodge to show want of authority. *Fidelity Co.* v. *R. R. Co.*, 32 W. Va. 244; *Boyce* v. *Montauk Coal Co.*, 37 W. Va. 91; *Ruffner Bros.* v. *Welton Salt Co.*, 36 W. Va. 244; 4 Thomp. Corp., section 5029; Cook Corp., section 725; 10 Cyc. 1149.

It may be claimed that these officers were not the proper officers to sign the deed and to place thereon the seal of the corporation. They were the chief officers of the Lodge, and acted as such without objection at the meeting of the board of directors hereafter mentioned, and were in our judgment the proper officers to execute the deed on behalf of the Lodge.

The question for determination is: Has the presumption of authority on the part of these officers to make the deed been overthrown by the facts appearing in this record? It was shown that the Lodge had a board of directors, composed of five members, viz.: Bone, councilor, Nichols, secretary, Stapleton, Griffith and Craddock. The by-laws were not produced or copied in the record, although demanded by the appellee. The evidence is ample that by-laws of the Lodge

were in existence. The evidence shows that a regular meeting of the members of the Lodge was held on the 18th of February, 1903, at which a quorum for the transaction of business was present; that the Lodge was indebted to Hopkins in something more than $600, which indebtedness had existed for some time. At this meeting, a letter from Hopkins urging payment was read by the secretary. A motion was adopted in relation to selling the real estate in controversy. Renick, the purchaser, was present, and offered to loan to the Lodge money with which to pay the Hopkins debt, or to buy the real estate at the price of $1,000, the Lodge to retain the use of the second story or lodge room for lodge purposes, and for the purpose of renting it to other lodges or societies, for the period of five years. The minutes of the meeting of February 18th show the following: "On motion of H. Stapleton that Deepwater Council No. 40 sell their lot and house or hall to J. E. Renick. Motion carried unanimously. Renick being present he stated to the Lodge that the condition on which he would purchase the building. He said he would give the Council $1,000.00 for their property, and lease them the upper story for five years, to have full control of the upper part of the building for lodge purposes and to rent to other lodges and get the full amount of rent and be at no expense for any repairs. The Council resolved that they would sell, and instructed the recording secretary to notify the other two members of the board to be present at J. E. Renick's for the purpose above stated." These minutes were signed by F. M. Bone, councilor, and John Nichols, secretary. The minutes of a subsequent meeting of the members of the Lodge, held on the 25th of February, 1903, show: "Records of previous Council read and approved." These minutes were also signed by F. M. Bone, councilor, and John Nichols, recording secretary.

On the 20th day of February, 1903, there was a meeting of the board of directors, at which three of the five members were present, Griffith and Craddock being absent. At this meeting, the deed mentioned was prepared, executed and delivered. The transaction appears to have been agreeable to all the members of the board present, until it came to signing the deed, when Stapleton seemed to become offended at being told that it was unnecessary for him to sign it, and

that it was only necessary for Bone and Nichols as chief officers to sign the deed. There is no claim that the deed was made upon considerations or terms differing substantially from the proposition of purchase made by Renick at the meeting of the Lodge, or as contained in the minutes of that meeting as recorded, although the language of the minutes is misrecited in the deed. Much oral evidence was adduced as to what action was taken by the Lodge at its meeting on the 18th, and as to the correctness of the minutes of that meeting. This evidence is conflicting. If no recorded minutes of that meeting existed, and if it were attempted to make up true minutes from this oral evidence, we apprehend that the attempt would be without accurate result. At the meeting of the 25th, the minutes of the meeting of the 18th were objected to by Griffith, who was not present at the meeting of the 18th or at the directors' meeting of the 20th, and perhaps by others. The evidence of the witnesses as to the character of the objection or objections made to the minutes of the meeting of the 18th is also conflicting. No evidence discloses any affirmative action by the Lodge, in relation to the objection to the minutes of the meeting of the 18th, at the meeting of the 25th. No motion was adopted or action taken rejecting the minutes, or in way disapproving them. The objections made to them by an individual member or members seem to have ended without action by the Lodge. There is also conflict in the evidence as to who prepared the minutes of the meeting of the 25th; but, without endeavoring to reconcile this conflict, it is undisputed that they were signed by Bone, councilor, and Nichols, secretary, without any act of the Lodge disapproving them. The minutes of the meeting of the 25th show the following, about which there is no controversy in the evidence: "On motion of C. C. Griffith that the Council reconsider the transaction of sale of the property to J. E. Renick. Motion carried." This minute goes very far to sustain the contention of the appellee that the Lodge had a previous transaction in relation to a sale of property to Renick; otherwise, there would have been nothing to reconsider. Upon the evidence and facts appearing, we think the recorded minutes of the meeting of the 18th must be taken as showing the action of the Lodge in relation to the sale of the property in controversy.

It is contended that the record discloses that no legal action

was taken by the board of directors authorizing the making of the deed. Of the five members composing the board of directors, three were present at the meeting at which the deed was prepared and executed. This meeting was held on the 20th of February. Notice of this meeting was sent by Nichols, secretary, by mail, on the 19th of February to the absentees, and in reasonable time for them to attend the meeting if they received the notice by due course of mail.. The evidence shows, without contradiction, that Craddock, one of the absentees, said that he had received the notice but could not attend. The evidence of Griffith, the other absentee, was taken on behalf of the Lodge. After carefully examing his evidence, we are unable to say that it shows that he did not receive the notice in time to attend the meeting. He was asked when he received the notice, and answered: "On the 19th of February." This witness seems to have had in mind the two meetings, one by the Lodge on the 18th and the other by the board of directors on the 20th, at neither of which was he present, and to have confused the two meetings in some of his answers.

It is also contended that the notice itself was insufficient, because it notified the members of a meeting to make arrangements to raise the money owing to Hopkins, and not to make sale of the property. The raising of money appears to have been uppermost in the mind of the secretary, who gave the notice, and, indeed, the raising of the money to pay the Hopkins debt seems to have been the reason which prompted the action of the Lodge at its meeting on the 18th of February. One way to accomplish that purpose was to sell the property. The by-laws of the Lodge and the rules and regulations of its board of directors, in relation to notice of meetings of its board, do not appear in the record. We cannot say that the notice did not meet every requirement of such by-laws, rules or regulations; and it was incumbent on the Lodge to show that the action of the board was illegal, else the presumption that the deed was with authority must prevail. It does not appear under the facts presented that the action of the board was illegal.

The record disclosing the action of the members of the Lodge in regular meeting assembled, and also the action of the board of directors, it is unnecessary to discuss the ques-

tion whether or not the action of both bodies was necessary, or, if not, the action of which body was proper and binding on the Lodge. Bearing upon this question, however, see *Gashwiler* v. *Willis*, 33 Cal. 11; 3 Thomp. Corp. section 3977; section 83 Acts 1901; *Fidelity Co.* v. *R. R. Co.*, *supra; Burr's Exors.* v. *McDonald*, 3 Grat. 215.

This brings us to the consideration of the other ground alleged for setting aside the deed—actual fraud in its procurement. Where actual fraud is relied on to set aside a deed, it must be clearly proved. This may be done by direct or by circumstantial evidence, or by both. *Board of Trustees* v. *Blair*, 45 W. Va. 812; *Greer* v. *O'Brien*, 36 W. Va. 277; *Parker* v. *Valentine*, 27 W. Va. 677; *Frank* v. *Zeigler*, 46 W. Va. 614.

Inadequacy of consideration is alleged. The estimates of the witnesses of the cost of the property in controversy, including lot and improvements, range from $2,200 to $2,500. The estimates of the witnesses of the actual value of the property range from $1,500 to $3,500, the greater number of the witnesses placing it at $3,000. The estimates of actual value seem to be based principally upon the present rental value under existing conditions. The upper story or lodge room had at the time of the sale a rental value of about $288 per year, exclusive of use by the Lodge for lodge purposes. The first story had a rental value of about $200 per year. The terms of purchase by Renick were $1,000, the Lodge retaining the second story with privilege to rent it to others for the period of five years. The rental value to the Lodge of this story, exclusive of use by the Lodge, for the five year period would amount to about $1,500, thus making a total consideration of about $2,500 which the Lodge received or will receive. No actual offer or proposition to purchase this property at the time it was sold is shown, other than the proposition by Renick. The Lodge was indebted to Hopkins in excess of $600. This $600 debt had been carried by the Lodge for some time. It had not grown less in amount. The membership of the Lodge in good standing and paying dues had greatly decreased. Under these circumstances, the sale was made to Renick. These parties were competent to contract, and entered into the contract. It will not be set aside in a court of equity on the ground

of inadequacy of consideration, unless the inadequacy be so gross as to shock the conscience and to amount to proof of fraud. Courts of equity, as well as courts of law, act upon the ground that every person who is not, from his peculiar condition or circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses, and whether his bargains are wise, discreet and profitable, or otherwise, are considerations not for courts of justice, but for the party himself, to deliberate upon. 1 Story, Eq., section 244; *Jones* v. *Degge*, 84 Va. 685; *Lowther Oil Co.* v. *Guthrie*, 52 W. Va. 88; *Wood* v. *Harmison*, 41 W. Va. 376; *Reese* v. *Kittle*, 56 W. Va. 269.

It is clear that the deed cannot be set aside on the ground of inadequacy of consideration. This is conceded by the brief of counsel for the Lodge. Inadequacy of consideration, although not so gross as to shock the conscience or amount to proof of fraud, may nevertheless be considered with other evidence or circumstances in determining the question of fraud. 14 Am. & Eng. Enc. Law 516. What evidence in this record shows actual fraud in the procurement of the deed mentioned? The bill alleges that the "deed was obtained by said J. E. Renick, with the assistance of John Nichols, for the purpose of obtaining the title to plaintiff's property without paying a just and adequate consideration for the same, and thereby defrauding plaintiff of its property." Where is the proof of this allegation? We are unable to point to it in this record.

It is said that John Nichols, secretary, did not enter correctly the minutes of the meetings of the Lodge held on the 18th and 25th of February; but, as we have seen, those minutes stand duly signed as the minutes of the Lodge unimpeached by action of the Lodge. It is also said that Nichols urged haste in consummating the sale, and declared on the day of the directors' meeting that something would have to be done, or that the property would go for $600. The acts and conduct of Nichols, secretary, may have manifested a desire to speedily consummate the sale, laboring perhaps under the fear of dire consequences from the enforcement of the Hopkins debt. It is not shown that the acts and conduct of Nichols were prompted by an improper motive, or were not in good faith. In the matter of haste,

Nichols does not stand alone. Other members of the Lodge, and perhaps all the members present at the meeting of February 18th, manifested a like desire to consummate a sale. The date of the meeting of the board of directors was fixed for the 20th, at the meeting of the Lodge on the 18th, not by Nichols, but by another member. We cannot impute improper motives to Nichols from his conduct and declarations, or to the other members of the Lodge from their conduct and declarations.

We have examined this record for proof of fraud on the part of Renick, and find nothing substantial or conclusive in that regard. One witness was produced who said that he was asked by Renick to "talk in favor of him getting" the property, but no terms were mentioned, no price named, at that time. It is not shown that this witness acted according to that request. On the contrary, he said that he did not. The evidence of this witness, at most, cannot be construed as raising more than a mere suspicion of fraud, if it is even sufficient for that purpose. Fraud cannot be established alone by proof of circumstances raising only a suspicion of fraud; but the evidence and circumstances must be of such character as to clearly establish the fraud. 1 Story Eq., section 190.

The circuit court weighed the evidence and circumstances appearing in this record, and determined the conflicts therein in favor of the appellee. The decree appealed from carries with it the presumption of correctness. Having examined this record, we are clearly of the opinion that the circuit court was fully justified in its determination of this case. The action of the Lodge in selling the property was perhaps hasty. It may have been an instance of acting in haste and repenting at leisure; but we find no sufficient evidence to sustain the allegations of fraud in the transaction.

The decree of the circuit court is affirmed.

Affirmed.

CHARLESTON

HEROLD *et al.* v. CRAIG.

59 353
f86 67

Submitted February 9, 1906. Decided April 10, 1906.

1. PARTITION—*Sale—When Decreed.*

A sale of real estate in a partition suit cannot be decreed, unless it affirmatively appears in the record that partition cannot be conveniently made and that the interests of the parties entitled to such real estate will be promoted by a sale thereof. (p. 356.)

2. EQUITY—*Evidence—Ex Parte Affidavit.*

An *ex parte* affidavit offered by one party cannot, over the objection of the adverse party, be considered by the court upon the hearing of a chancery cause upon its merits, in the determination of the issues raised by the pleadings, where there has been no previous consent that such affidavit may be so considered, and no consent to, or waiver of notice of, the taking of such affidavit. (p. 356.)

3. SAME—*Consent Decree.*

A draft of a consent decree, agreed to and signed out of court by the parties to a pending cause, cannot be entered as a consent decree, if at the time such draft is offered for entry consent thereto is withdrawn, and its entry is objected to by one of the parties who signed it and who will be materially affected thereby. (p. 358.)

Appeal from Circuit Court, Nicholas County.

Bill by Henry W. Herold and others against James S. Craig. Decree for plaintiffs, and defendant appeals.

Reversed and Remanded.

A. W. CORLEY and BROWN, JACKSON & KNIGHT, for appellant.

ALDERSON & HORAN, LINN, BYRNE & CATO, and MOLLOHAN, MCCLINTIC & MATHEWS, for appellees.

COX, JUDGE:

This partition suit was instituted by Henry W. Herold, J. A. Mearns, John D. Alderson, Allen Rader and A. W. Bobbitt against James S. Craig, in the circuit court of Nicholas county, and such proceedings were had therein that a decree

for sale of the lots mentioned in the bill was entered. From this decree defendant Craig appeals.

The bill alleges that certain lots of land in the town of Summersville are owned jointly and in fee by the plaintiffs and defendant, in the following undivided interests: Rader one-twelfth, Bobbitt one-twelfth, each of the other plaintiffs one-sixth, and the defendant one-third; that there is upon the lots a building erected for school purposes, which is not suitable for any other purpose, and is of greater value than the residue of the lots; that the lots cannot be conveniently partitioned among the owners thereof; that the interests of those entitled to the lots and their proceeds will be promoted by a sale and distribution of the proceeds; and prays that a sale of the lots and distribution of the proceeds be decreed, and for general relief.

Defendant Craig answered the bill, admitting ownership of the lots to be as alleged in the bill and that the building on the lots was erected for school purposes, and denying that the building is not suitable for any other than school purposes or that it is of greater value than the residue of the lots, and denying that the lots are not susceptible of convenient partition or that the interests of those entitled thereto or to the proceeds thereof will be promoted by a sale and distribution of the proceeds, and asking that the property be maintained for school purposes according to the original intention of the parties, or that the lots be partitioned in kind. No depositions were taken in the cause. The exact quantity of land contained in these lots does not appear by the bill, but the quantity is stated in the petition for appeal to be 3 1-4 acres.

On the 28th day of January, 1905, the plaintiffs moved the court for the entry of the following paper as a consent decree in the cause: "H. W. Herold, et als, pltffs., versus James S. Craig, deft. In Chancery. This cause came on this day to be heard, upon plaintiff's bill, defendant's answer and plaintiff's replication thereto, exhibits filed, former orders and decrees herein entered, and it is agreed by all the parties, and is adjudged, ordered and decreed by agreement as aforesaid, that A. J. Horán, who is hereby appointed a special commissioner for the purpose shall on some court day, for said county, sell at public auction the real estate in the bill and

proceedings mentioned for cash, to the highest bidder, at the front door of the court house of said county, after first giving notice of the time, terms and place of sale by notice published *one* a week for four successive weeks in the Nicholas Chronicle, a weekly newspaper published in said county; and said commissioner shall report his proceedings hereunder to court, in order to a further decree. But before making said sale said commissioner shall execute before the clerk a bond with approved security, in the penalty of $3000.00 and conditioned according to law. And plaintiff J. A. Mearns is directed to pay to the parties to this suit and entitled thereto the sum of One Hundred and Fifty Dollars, and interest of rent money in his hands according to their respective interests, to-wit: To James S. Craig one-third, to H. W. Herold and John D. Alderson one-sixth each, to Allen Rader and A. Bobbitt each a twelfth; and reserving a one-sixth his interest. The undersigned, the parties to the above styled suit, hereby agree that the circuit court of said county of Nicholas, shall enter the above decree at its next term, this January 14th, 1905. Allen Rader, by John D. Alderson. A. W. Bobbitt, by Alderson & Horan, his attorneys. John D. Alderson, H. W. Herold, J. A. Mearns, James S. Craig."

To the entry of this paper as a consent decree, the defendant Craig filed his objections in writing, and in support thereof his affidavit, stating that the paper asked to be entered as a consent decree was signed by him in great haste, without mature deliberation and without opportunity to consult his attorneys. The plaintiffs, in support of the motion to enter said paper as a consent decree, filed the affidavit of J. A. Mearns, stating matters tending to show that there was no great haste or lack of mature deliberation on the part of Craig in signing said paper, and that the real estate mentioned in the bill is not susceptible of convenient partition, and that the interests of those entitled thereto or to the proceeds thereof will be promoted by a sale and distribution of the proceeds. By his objections in writing, the defendant also objected to the consideration of said paper, and of the affidavit of Mearns, upon the merits of the cause, and objected to the hearing of the cause. The decree complained of recites, among other things, that the cause was

heard upon said paper offered as a consent decree, and upon said affidavits.

The paper offered was not entered as a consent decree; but the decree which was entered directed a sale of the lots for cash, substantially in accordance with the provisions of said paper. The question then is; Was the decree complained of justified by the state of the record at the time of its entry? Issues were made between the plaintiffs and the defendant as to whether or not the lots were susceptible of convenient partition, and as to whether or not the interests of those entitled to the lots, or to the proceeds thereof, will be promoted by a sale and distribution. It is settled by a long line of decisions, in the State and in Virginia, that the common law right of partition in kind cannot be refused because of the provisions of our statute, section 3, chapter 79, Code, unless it affirmatively appears that partition cannot be conveniently made, and that the interests of the parties will be promoted by a sale of the property. *Croston* v. *Male*, 56 W. Va. 205, (49 S. E. 136); *Stewart* v. *Tennant*, 52 W. Va. 559; *Roberts* v. *Coleman*, 37 W. Va. 143; and other cases; *Curtis* v. *Sneed*, 12 Grat. 260; *Cox* v. *McMullin*, 14 Grat. 82; *Howery* v. *Helms*, 20 Grat. 1; *Zirkle* v. *McCue*, 26 Grat. 532. These two essential facts must affirmatively appear in the record, before a decree of sale can be entered. They did not appear by the pleadings, because the existence of these facts were put in issue by the pleadings. These facts did not appear in any way, unless the affidavit of Mearns could, over the objection of the defendant, have been considered for that purpose, or unless the paper offered as a consent decree could have been considered and was sufficient for that purpose.

The affidavit was *ex parte*. It was filed in support of a motion to enter the paper offered as a consent decree. It was objected to by the defendant. No consent to its consideration, in the determination of the issues raised by the pleadings, and no consent to, or waiver of notice of its taking was shown. The question here presented does not involve the right to have an *ex parte* affidavit considered upon a motion to grant or dissolve an injunction, or in support of or opposition to any interlocutory application, but the right to have this *ex parte* affidavit considered by the court upon the merits of the cause, in the determination of the issues raised by

the pleadings. Our statute, section 35, chapter 130, Code, is conclusive as to this question. It provides that reasonable notice shall be given to the adverse party of the time and place of taking every deposition. As said by Dr. Minor, concerning the like Virginia statute, it leaves nothing to inference as to the necessity for notice. 4 Minor's Inst. 844. See also 2 Barton Ch. Pr. § 220; 1 Hogg's Eq. Proceed. § 480; 2 Cyc. 35, note 1; *Peterson* v. *Ankrom*, 25 W. Va. 56; *Lewis* v. *Bacon*, 3 Hen. & Munf. 89; *Blincoe* v. *Berkeley*, 1 Call 405; *Stubbs* v. *Burwell*, 2 Hen. & M. 536. It is clear that the affidavit could not properly have been considered by the court in the determination of the issues raised by the pleadings, under the circumstances appearing.

It is contended that it was proper for the court to consider the paper offered as a consent decree as an agreed statement of facts, and that as such the paper was sufficient to sustain the decree. It is also contended that, while the decree entered does not purport to be a consent decree, it should be so treated, as it embodies substantially the provisions of the paper. We do not think that the paper could have been considered as an agreed statement of facts. It does not purport to be an agreed statement of facts. Likewise, it does not purport to be an agreement of compromise of the matters in controversy in the cause. But it purports to be, and is, solely an agreement that the paper shall be entered as the decree of the court. The paper contains no words relating to the convenience of partition, or to the promotion of the interests of the parties by sale and distribution. If the paper could have been considered as an agreed statement of facts, it is without substance, and without facts upon which to determine the issues.

As the decree entered embodies substantially the provisions of the paper offered as a consent decree, it may be true that the defendant cannot be said to have been prejudiced by the decree, if the paper should have been entered as a consent decree. This brings us to the question: Should the paper have been entered as a consent decree? This paper is a draft of a consent decree agreed to and signed out of court, before the hearing of the cause, by the parties. When offered by the plaintiffs for entry, the consent of the defendant was withdrawn, and its entry objected to by him. A number of cases

may be found holding that a party may withdraw consent, before entry of a decree, for inadvertence, misapprehension, or fraud; but whether or not a party may so withdraw his consent arbitrarily and without cause, is a different question. The latest English case upon this subject which has come under our notice, and which refers to the previous English cases, is *Harvey* v. *Croydon Union Rural Sanitary Authority*, decided on appeal in 1884, 26 Ch. Div. Law Rep. 249. Cotton, L. J., in the course of his opinion in that case, said: "There being, however, no authority which is binding on us to the contrary, we must decide according to what we think the right course, and it must be understood henceforth to be the rule that a consent given by the authority of the client cannot be arbitrarily withdrawn." With this view Lord Coleridge agreed. Upon the subject under discussion, see also 2 Daniels Ch. Pl. & Pr. 974; *Hoyt* v. *Jesse*, 3 Ch. Div. 177; *Davis* v. *Davis*, 13 Ch. Div. 861; *Coultas* v. *Green*, 43 Ill. 277; *Horton* v. *Baptist Church, etc.*, 5 Vt. 309. In the English case first mentioned, no previous authority is cited to sustain the holding of the court. In fact, the opinion states that the holding is without previous binding authority, and that the rule announced is to be the rule henceforth. How far the announcement of the rule in that case was controlled by the English system of equity procedure, which differs from our system in many respects, we are unable to say. We are cited to the exhaustive opinion on the subject of consent decrees delivered by JUDGE GREEN for this Court in the case of *Marion* v. *Fahy*, 11 W. Va. 482, wherein it is said: "The entry of a consent decree is a statement on the record, not that theretofore the parties agreed to enter such a decree, but that they now (when the decree is entered) consent to its entry. And if they do not when it is to be entered, consent to the court's entering it, it cannot be so entered." The rule announced by this Court in that case seems to us to be sustained by sound reasoning. Suppose, for illustration, that a draft of a consent decree, which purports to have been agreed to and signed by the parties, is offered for entry, and one of the parties objects and says that he did not agree to or sign such draft, or that if he did agree to and sign it he did so inadvertently or under misapprehension, or that his agreement was procured by fraud. In this manner, new contro-

versies, foreign to the controversies raised by the pleadings, are encountered. These new controversies are often as important as the controversies raised by the pleadings. It does not seem reasonable that the court may proceed to try and determine these new controversies, in an irregular and informal way, without pleadings, and, compel the entry by consent of a decree to which one of the parties does not then consent. The result of such a determination would practically be to compel the specific performance of the agreement to enter such draft as a consent decree, without formality and without pleadings. The entry of a consent decree requires the sanction or assent of the court. *Roemer* v. *Neuman, et al.*, 26 Fed. Rep. 332. Parties may agree out of court as they choose; but the entry of a consent decree requires consent to its entry by the parties, and the sanction or assent of the court, at the time of its entry; and if one of the parties who will be materially affected thereby withdraws his consent and objects to its entry at the time it is offered, it cannot be entered. This is the principle stated by JUDGE GREEN for this Court. It seems to us that it is the safer practice. This view leaves the parties free to agree as they may choose without consent of the court, and, if controversy arises, to litigate the validity of their agreement in any proper way. We therefore hold that the said paper offered as a consent decree was not sufficient to sustain the decree complained of; that the paper should not have been entered as a consent decree, under the circumstances existing at the time it was offered; and that the decree complained of cannot be treated as a consent decree. What we have said does not apply to a consent decree actually entered by consent of the parties and with the sanction and assent of the court. Upon that subject, see *Marion* v. *Fahy*, *supra*; *Doss* v. *Tyack*, 14 How. 297.

It is unnecessary to discuss any other ground advanced for reversing the said decree. For the reasons stated, the decree complained of is reversed, and the cause remanded for further proceedings. The proper further proceedings in the cause are indicated by the opinion of this Court in the case of *Stewart* v. *Tennant*, *supra*.

Reversed. Remanded.

CHARLESTON

50 360
60 312

KENNEWEG CO. v. MILEY.

Submitted January 31, 1906. Decided April 10, 1906.

1. TRIAL—*Directing Verdict.*

Where a case depends on the weight of evidence and deductions from it, and conflicting evidence and credit of witnesses, the court should not instruct a verdict. (p. 362.)

Error to Circuit Court, Hardy County.

Petition by the Kenneweg Company and others against John R. Miley. Judgment for plaintiffs, and defendant brings error.

Reversed.

H. B. GILKESON, for plaintiff in error.

BENJAMIN DAILEY, M. W. GAMBLE, and C. W. MCCAULEY, for defendants in error.

BRANNON, JUDGE:

The Kenneweg Company and other creditors of John R. Miley levied certain executions against him upon a stock of goods as his property. J. Watson Miley executed a suspending bond and a forthcoming bond and claimed that said stock of goods was his property and not liable for the debts of John R. Miley. Then the Kenneweg Company and other creditors filed a petition in the circuit court of Hardy county asserting the liability of said property to their execution and asking that the court make an order requiring J. Watson Miley to appear and state the nature of his claim to said property and maintain or relinquish the same, and the court made such order, and when J. Watson Miley appeared the court stated as the issue whether the stock of goods was the property of John R. Miley or J. Watson Miley and made the creditors plaintiffs in the issue. This issue was tried by the jury, and on the trial the court instructed the jury that the evidence did not warrant a verdict for the defendant, and required it to find for the plaintiffs, and the jury did so, and the court gave judgment that the property at the time of said levy was the property of John R. Miley and subject to the

levy of said execution. J. Watson Miley brought the case to this Court on writ of error.

The only question of moment in this case is one purely of fact. Was the stock of goods the property of John R. Miley or J. Watson Miley? It was purchased from S. L. Harper in the name of J. Watson Miley; but the creditors claim he was a mere figure-head, and that the purchase was really for John R. Miley, and that it was his stock of goods, and that the business, though carried on in the name of J. Watson Miley, was really the business of his older brother, John R. Miley, who was a man of extensive business, but had met with business disaster, and was utterly insolvent, and that the purchase and transaction of the business in the name of J. Watson Miley was a sham to protect the property and business from the pursuit of John R. Miley's creditors. A great number of witnesses were examined, a great number of facts and circumstances were given in evidence; the evidence was materially conflicting in vital matters; and not only this, but the credit of witnesses was deeply involved. The versions of John R. Miley and J. Watson Miley as witnesses were in the case, and their credit involved. The manager of the store business, Shearer, whose evidence was vital in the case, necessarily so, because he conducted the store business, was a witness. Not only was his credit involved from the nature of the case, but his general reputation for truth and veracity was attacked and a number of witnesses introduced as to it. I think this statement is enough at once to show that the case was one peculiarly appropriate for a jury. It is useless to detail evidence and circumstances. It is enough to say that the decision of the court depended on the quantity and weight of evidence and inferences to be deduced from facts and circumstances, numerous and varied in kind, and depended upon their weight, that is, jury questions. *Smith* v. *Railroad*, 48 W. Va. 69. Then, too, the evidence was highly conflicting. Especially reflect that Shearer's evidence was assailed and witnesses introduced to impeach him were equivocal in their evidence, and the force of their evidence depended very largely upon their faces, countenances, demeanor, reluctance and emphasis, which could be judged of only by the jury. Scarcely any case was more appropriate for a jury. We cannot think that the court carried out legal principles in with-

drawing the case from the jury. In *White* v. *Brewing Co.*, 51 W. Va. 259, it is held that a court may instruct a verdict where the evidence plainly and decidedly preponderates; but at the same time it put in the precautionary point, "If the material facts are doubtful and a verdict for either party would be sustained, the circuit court should not instruct the jury to find against such party." It is very difficult, in practice, to lay down in words just where a court may strike out evidence or instruct a verdict. Each case depends upon itself largely. This difficulty is well stated by Judge SANDERS in *Cobb* v. *Glenn Boom and Lumber Co.*, 57 W. Va. 49, where many of the authorities are discussed. Some of the cases there cited say that wherever the evidence tends in a fairly appreciable degree to sustain a plaintiff or defendant, the court should not strike out the evidence or instruct a verdict. That case holds what is, I think, the true test, that is whether the court should set aside a verdict in favor of the party against whom the verdict is instructed. In *Manns-Bruning Shoe Co.* v. *Prince*, 51 W. Va. 510, we held that "A verdict which, on the fixed facts of the case, is contrary to law, must be set aside." But what are the fixed facts of this case? Are they indisputable under the evidence? Cannot men reasonably differ about them? Test this case by these principles. We say that the questions of fact solving this case are severely involved under the evidence. Especially we add, as a matter of decided emphasis in this Court, that the evidence is conflicting, not merely upon clashing circumstances, but the credit of the witnesses is involved. We cannot say under the peculiar character of the evidence of witnesses assailing the general reputation for truth and veracity of Shearer, whether he is to be believed or not, their evidence being equivocal and indefinite; but jurors face to face with the witnesses, face to face with Shearer, could judge as we cannot. Granting that if it were a question of mere preponderance, this Court might take up the scales and weigh the evidence and say whether it greatly and decidedly preponderated for the creditors; yet when the credit of the witnesses is involved, not only of the two Mileys, but especially of Shearer, our path would go through the forest of uncertainty. This is for a jury. *Young* v. *Railroad*, 44 W. Va. 218. We are unable to say what was proven in this case, and in view of another trial

we desire to be understood as saying that we do not express an opinion on the evidence, because we say that it is a proper case for the decision of a jury.

The deposition of J. Watson Miley was introduced in the case by the plaintiffs. We think there is no error in this. It was given in another case in which the debts of John R. Miley were being ascertained, and in which he filed a claim, and it involved matters involved in this suit, and it was admissible as admissions by J. Watson Miley proper to go before the jury.

Therefore, we reverse the judgment, set aside the verdict and remand the case for a new trial.

Reversed.

CHARLESTON

HOPKINS v. PRICHARD.

Submitted January 30, 1906. Decided April 10, 1906.

1. APPEAL—*Interlocutory Decree—Matters Reviewable.*

When an interlocutory decree is rendered in a cause which so far settles the principles of the cause as to make the decree appealeable, and subsequent decrees carrying out the principles so settled, are entered in the cause, an appeal from such interlocutory decree alone, will not bring up for review such subsequent decrees, although the same were entered long prior to the granting of such appeal. (p. 366.)

2. SAME—*Reversal—Effect.*

After the reversal of the interlocutory decree on such appeal, the subsequent decrees mentioned not having been set aside, reversed, or corrected by bill of review, appeal, or otherwise, the same remain firm and valid, although inconsistent with the judgment of this Court in reversing the first mentioned decree. (p. 368.)

Appeal from Circuit Court, Cabell County.

Bill by J. C. Hopkins against R. H. Prichard and others.

Decree for plaintiff, and defendants Harvey, Hagen & Co. appeal.

Reversed.

WALLACE & FITZPATRICK, for appellants.

VINSON & THOMPSON, for appellee.

MCWHORTER, PRESIDENT:

This cause was here once before, brought to this Court by L. H. Burks who had come into the cause by petition claiming prior liens on certain lands sought to be sold, and appealing from a decree entered on the 7th day of July, 1898. See 51 W. Va. 385, 41 S. E. 347. The decree then appealed from referring to the report of Thomas R. Shepherd, commissioner, filed on the 28th day of May, 1898, and the exceptions thereto of L. H. Burks says: "And the Court having maturely considered the exceptions to said report and the questions of law arising upon the ownership of the lands reported to be held by R. H. Prichard, in his individual capacity and as trustee, submitted to the Court by commissioner Shepherd, is of the opinion that the several tracts of land shown by the commissioner and by the record in this cause to have been standing in the name of R. H. Prichard, trustee, and R. H. Prichard at the time of the levying of the attachments mentioned and described in this cause were purchased by R. H. Prichard with his individual assets, and that the same were not purchased with the partnership funds of Burks & Prichard for partnership purposes, and that there is therein no resulting trust in favor of the creditors of Burks & Prichard superior to the rights of the attaching creditors in this cause acquired under their attachment, but that said land is first subject to the attachments. It is therefore considered by the Court that the exceptions of L. H. Burks to said commissioner's report be and they are hereby overruled, and the said commissioner is directed to carry out the former decree of reference herein in accordance with these views. And by consent of all parties it is further adjudged and ordered that said commissioner complete and file his further report herein at the present term of this Court."

The lands involved were two tracts of 600 acres and 828 acres, respectively, the court holding as shown by the de-

cree just quoted that said lands were "first subject to the attachments," the decree was reversed as to the 828 acres tract, giving the appellant, Burks, priority of lien on said tract. 51 W. Va. 385. It seems that on the 21st day of December, 1898, a decree of sale was entered by the circuit court of Cabell county, and a sale of the said two tracts of land together had thereunder, for the sum of $1,500, and on the 11th day of December, 1899, the net proceeds of the sale of said two tracts of land amounting, after the payment of costs of sale and suits and taxes, to $780, was paid to Harvey, Hagen & Company on account of its lien which had been decided by the circuit court to be the first lien on both tracts. On the 11th day of April, 1903, the cause was heard in the said circuit court, upon the former proceedings and upon the mandate of this Court, when Harvey, Hagen & Company moved the court to set aside the sale of the two tracts, and proposed to refund the money received from the special commissioner in case there should be a resale of said tracts, decreed, which motion the court overruled. Said Harvey, Hagen & Company then moved the court to refer the cause to a commissioner to ascertain what proportion of costs, taxes, and expenses should be borne by said 600 and 828 acres tracts of land, respectively, and what part of the $780 the net proceeds of sale received by it should be refunded and paid back by said Harvey, Hagen & Company, which motion was also overruled, and the court refused to make such reference, "And the court being of the opinion from the mandate, and opinion of the Supreme Court, that the 828 acre tract of land was the land of Burks & Prichard, and that L. H. Burks was entitled to the proceeds from the sale thereof, and that the said Harvey, Hagen & Company was not entitled to the $780 paid it or any part thereof, and that the whole thereof with interest should be paid to said L. H. Burks," and decreed accordingly that said Burks recover from said Harvey, Hagen and Company, $935.22, being the principal and interest of said $780 from December 11, 1899, until the date of the decree, with interest on said $935.22 from date of decree until paid and awarded execution therefor; from which decree Harvey, Hagen & Company appealed, claiming that the court erred in refusing to set aside the sale of the two tracts, and in refusing to order a resale

thereof. Also in refusing to refer the cause to a commissioner for the purposes set out in its motion; that it erred in holding that appellant was not entitled to retain any of the fund realized from the sale of said tracts of land which had been paid to it on the 11th day of December, 1899; that it erred in rendering judgment against appellant for $935.22, in favor of L. H. Burks.

The former appeal in this cause was alone from the decree of July 7, 1898, which, while interlocutory, settled the rights of the parties as to the priorities of their liens on the said two tracts of land, the present appellant, Harvey, Hagen & Company, claiming prior liens thereon by virtue of its attachment, and L. H. Burks who was not a party to the suit coming in by petition and answer, claiming that said two tracts of land were not the property of Prichard individually, and not liable to the attachment of Harvey, Hagen & Company, but was the property of Burks & Prichard, and first liable to the social debts of the firm then represented by him, and for which he had the prior lien. Neither the decree of sale which was entered on the 21st of December, 1898, nor the decree confirming the sale made thereunder, and under which the net proceeds of sale were paid on the 11th day of December, 1899, to Harvey, Hagen & Company, was vacated, annulled, set aside, or appealed from, and if those decrees remain undisturbed, firm and valid, what should have been the action of the circuit court on the 11th day of April, 1903, when the decree now complained of was entered? Did the former appeal from the decree of July 7, 1898, bring in review before this Court, decrees and orders entered by the circuit court in the cause subsequently thereto? In that thorough and exhaustive chapter under the title "Appeal and Error," 3 Cyc., 229, we find: "While an appeal from an interlocutory, as well as from the final judgment or decree, brings up for review all the proceedings in the cause anterior to the final judgment or decree an appeal from an interlocutory order or decree alone brings up for review only the order or decree appealed from."

In *Railway Company* v. *Railway Company*, 100 Ill. 21, it is held: "An appeal brings up for review only such matters as precede the entry and perfecting of the appeal,

and not any matter occurring subsequently; and a refusal of an appeal as to such subsequent proceeding, will not have the effect of bringing them up for hearing on the first appeal," and in *Pa. Company* v. *Greso*, 79 Ill. App. 127, it is held: "Where no appeal is taken from an order overruling a motion to vacate a judgment, the appellate court, on appeal from the judgment alone, cannot review such order." *Kahn* v. *Kahn*, 15 Fla. 400: "Where an inferior court, after appeal and proper measures to secure a stay of proceedings, continues to proceed, the proper remedy is an appeal to the exercise of the power of the appellate court and not by an injunction from a court of equity." It has been held by both the court of appeals of Virginia and this Court, that a judgment on a forth-coming bond, and a decree or previous judgment on which the execution issued, on which the forth-coming bond was given, constitute but one proceeding so far as the *supersedeas* is concerned. In *Laidley* v. *Bright*, 17 W. Va. 779, in rendering the opinion of the Court, JUDGE GREEN says: "The judgment of a forth-coming bond is not considered as brought up by a *supersedeas* to the first judgment. See *Moss* v. *Moss*, 4 H. and M. 303; but the two judgments constitute one proceeding, so far as granting a *supersedeas* is concerned; and if the judgment on the forth-coming bond has been rendered before the *supersedeas* is issued, and the error exists in the first judgment, the petition ought to pray a *supersedeas*," citing *Munroe* v. *Webb*, 4 Munf. 73; *McCormick* v. *Bailey*, 17 W. Va. 585. He further adds, "So far have the courts gone in holding that it is proper for the appellate courts to try the whole matter in one case, that an appellate court may properly extend the *supersedeas* first awarded to the judgment subsequently obtained on the forth-coming bond. See *Bell* v. *Bugg*, 4 Munf. 260. We must therefore consider this case on the merits." It will be observed that the court say: "The petition ought to pray a *supersedeas* to both judgments; and they should be both embraced in the *supersedeas*." In the case cited of *Bell* v. *Bugg*, the court on motion of the plaintiff in error extended the original writ of *supersedeas* to a judgment which had subsequently been obtained upon a forfeited forth-coming bond. In case at bar, the decree of sale entered on the 21st of December, 1898,

was a final decree and appealable, and might have been heard with the appeal taken in the cause from the decree on July 7, 1898, if the party in interest, whose rights were prejudiced thereby, had by petition asked that the appeal and *supersedeas* be extended to embrace such decree or decrees. The errors assigned in the petition for appeal were confined exclusively to the decree of the 7th of July, 1898, and the prayer was for an appeal from, and *supersedeas* to the said decree, although it appears that the appeal was not granted until June 30, 1900; more than six months after the proceeds of the sale of the two tracts of land had been paid over to the attaching creditor, Harvey, Hagen & Company, under the decrees of the court. The briefs of counsel in the cause on that appeal, made no reference whatever to any decree entered subsequent to that of July 7, 1898, and the cause was decided upon the appealability of that decree. The appellant, having failed to contest the validity or correctness of the subsequent decrees, the decree of December 21, 1898, and the one subsequent thereto, confirming the sale of said tracts of land, the same not being set aside, annulled, or appealed from, remain firm and valid, and the circuit court had no power or control over them, hence it committed no error in overruling the motion of Harvey, Hagen & Company, on the 11th of April, 1903, to set aside the sale of the two tracts of land, as well as the other motion to refer the cause to a commissioner for the purposes stated in its motion; but the net proceeds of sale of said tracts of land having been paid over to Harvey, Hagen & Company in the cause under said decrees therein, which were appealable, but which were never sought to be set aside, reversed, or corrected by bill of review, appeal or otherwise, the court erred in rendering its decree and judgment in favor of L. H. Burks against said Harvey, Hagen & Company for the said $935.22.

For the reasons herein set forth, the decree of April 11th, 1903, now complained of, is reversed, set aside and annulled.

UPON RE-HEARING.

Counsel for appellee in their petition for re-hearing contend that the said decrees of sale and confirmation of sale, rendered after the decree of July 7, 1898, which was

brought to this court on appeal by the appellee here, were mere nullities and void. The appellee had, with the consent of the Court, by petition and answer, made himself a party to the cause and defending his rights therein, and his interests were directly affected by said decrees of sale and confirmation; and, although said decrees were rendered some months after that from which he appealed and before his appeal was taken and were final and appealable, he failed to embrace, or include them in his said appeal of June 30, 1900, and to have the same reviewed as he could and should have done.

It is further contended that the appeal should be dismissed for the reason that the only question involved between appellant and appellee is one of costs. This cannot be the case when the decree of December 21, 1898, for sale and the subsequent decree of confirmation remain undisturbed. The whole judgment in favor of appellee against appellant is necessarily involved, and that the appellee failed to have said decrees reviewed is his misfortune.

The proposition of appellant, Harvey, Hagen & Company, contained in the decree here complained of, to refund the $780, the net proceeds of sale of the two tracts of 600 acres and 828 acres of land, in case a resale of the said tracts should be decreed; or, that the cause should be "referred to a commissioner to ascertain what proportion of costs, taxes and expenses should be borne by said 600 and 828 acres tracts of land respectively, and what part of the $780, the net proceeds of sale received by it, should be refunded and paid back by said Harvey, Hagen and Company;" whether made in a spirit of equity or under a misapprehension of the effect of the decree of sale entered December 21, 1898, and the subsequent decree confirming the sale, were retracted and withdrawn by it upon the rendition of the decretal judgment against it for the sum of $935.22 in favor of L. H. Burks, from which decree it has appealed and which retraction it had a right to make and rely upon the effect of the said decrees of sale and confirmation, which redounded to its interest, upon its proposition or motions being rejected by the court.

We see no reason for changing the former decision in this cause, November, 1904, and the decree complained of is reversed.

Reversed.

CHARLESTON

O'NIEL *v.* TAYLOR *et al.*

59 370
64 471

Submitted January 16, 1906. Decided April 10, 1906.

1. REFERENCE—*Report of Commissioner.*
A commissioner may authorize any person to write his report at his dictation and under his supervision. It is not essential that it should be in his own handwriting. (p. 376.)

2. MECHANIC'S LIEN—*Account Filed—Sufficiency.*
In a contract directly with the owner, our statute does not require of the contractor an itemized account of work done and material furnished to enable him to procure his mechanic's lien, but he is required to file "a just and true account of the amount due him after allowing all credits, together with a description of the property intended to be covered by the lien sufficiently accurate for identification, with the name of the owner or owners of the property, if known." (p. 377.)

3. SAME.
A general statement of the demand of such contractor showing its nature and character, and the amount due or owing thereon after allowing all credits is a compliance with the statute, (p. 377.)

4. SAME—*Filing Lien.*
When repairs, improvements and additions are made to a building under contract directly with the owner and the work prosecuted to completion, dates when the several items of work was done and materials furnished are not material except that it must appear that the last work done and the last material furnished necessary to the completion of the work was done and furnished within sixty days before the filing and recording of the mechanic's lien. (p. 378.)

5. SAME—*Time of Doing Work and Furnishing Material.*
When a contractor undertakes with the owner to make such repairs, improvements and additions, without a contract price as to the whole work but in the course of the work it is agreed that a certain sum shall be paid for a particular part of the work which is done along with the rest of the work, such sum may constitute one item in the general account, and form a part of the mechanic's lien although the work and material represented by said sum may have been done and furnished more than sixty days prior to the filing of the lien. (p. 378.)

6. SAME—*Appurtenances to Building.*
Under such general contract with the owner for such work and repairs where walks and fences on the premises are constructed

as appurtenant to such building, and at the same time, the contractor is entitled under our statute to include the same in his mechanic's lien. (p. 379.)

7. SAME—*Property Subject.*
And so, the price of a coal house and sample room, constructed on the premises under such contract appurtenant to and to be used with such building, used as a hotel, is proper to be included in such mechanic's lien. (p. 379.)

8. SAME.
A mechanic's lien may include an item for a drain pipe from the cellar of a house into a sewer in the street. Such drain pipe is a part of the house. (p. 381.)

9. SAME—*Enforcement—Counsel Fees.*
In a suit to enforce mechanic's liens it is error to decree as part of plaintiff's costs "the sum of $300, counsel fees hereby allowed counsel for plaintiff for conducting this suit." (p. 383.)

10. LIENS—*Actions—Sale,*
In a suit to sell real estate to satisfy mechanic's liens and judgment liens and also a subsequent trust lien, which covers a part only of the real estate so to be sold, it is error to decree the sale of the property as a whole. (p. 384.)

Appeal from Circuit Court, Mingo County.

Bill by J. H. O'Niel against Charles B. Taylor and others. Decree for complainant, and defendant Charles B. Taylor appeals.

Affirmed in part. Reversed in part.

HOLT & DUNCAN, for appellant.

C. H. JONES, for appellees.

MCWHORTER, PRESIDENT:

J. H. O'Niel filed his bill in equity in the circuit court of Mingo county against Charles B. Taylor, W. B. Cox, Bank of Williamson and others to enforce his mechanic's lien against Lots 1, 2, 3, 4, and 5 in Block No. 17 in the Town of Williamson, the property of defendant Taylor, upon which was located an hotel building and its appurtenances known as the "Hotel Moose," which mechanic's lien was duly recorded on the 31st day of January, 1903, claiming a balance then due of $1,259.35 after allowing all credits to which the defendant was entitled. The defendant W. B. Cox also filed and recorded a mechanic's lien upon the same property claim-

ing a balance due him of $1,544.57 for work and labor and material furnished, including heating apparatus for said hotel, the contract for which heating apparatus amounted to $475.00; also the defendant Georgia Lumber Company filed its lien for material furnished in the construction and repair of the said hotel property claiming a balance of $1,273.24, The plaintiff in his bill set up his own lien as well as alleging the other mechanic's liens and several judgments against the said C. B. Taylor which were liens upon the said property, as well as a vendor's lien in favor of W. J. Williamson who conveyed the said property to plaintiff for $3,500.00 and interest which was a lien on Lots Nos. 1, 2, 3, and 5 and the undivided half of Lot No. 4 in said Block No. 17. A decree of reference was made in said suit on the 15th day of May, 1903, to a commissioner of the said court to ascertain the liens upon the said Lots 1, 2, 3, 4, and 5; the holders of such liens and the amount and priorities thereof; the title of said defendant Charles B. Taylor to said real estate and whether or not the rents, issues and profits of said estate for a period of five years would pay off and discharge the said liens against it.

Charles B. Taylor filed his answer denying the validity of the liens of the said plaintiff and of W. B. Cox and the said Georgia Lumber Company and denying especially that if liens at all they covered Lots 1 and 2 of said real estate. Defendants Cox and the Georgia Lumber Company filed their answers, setting up their respective liens. On the 15th of September, 1903, the commissioner filed his report showing the various liens upon the said property. First, the vendor's lien; second, the several mechanic's liens including the interest, that of plaintiff at $1,110.18 and W. B. Cox $1,413.44 and the Georgia Lumber Company $992.26, which three liens were reported as the second lien upon Lots Nos. 1, 2, 3, and 5 and the one-half of Lot No. 4, and the first lien upon the other half of Lot No. 4; and besides the judgment liens reported with their priorities he reported as the ninth lien by virtue of a deed of trust in favor of C. H. Jones, trustee, to secure the payment of $4,000 due by note dated July 31st, 1903, four months after date to the Bank of Williamson, which was the ninth lien on Lots 3, 4, and 5 of Block 17. The Georgia Lumber Company excepted to the report because it did not report the amount properly due on its me-

chanic's lien, to-wit: the sum of $1,330.53. The defendant Charles B. Taylor filed in open court various exceptions to the said report. The depositions taken upon which the commissioner's report is based are filed in the record.

The cause came on to be heard on the 24th day of January, 1904, and the court sustained plaintiff's exceptions Nos. 3, 4, 5, and 10 affecting the lien of the plaintiff and eliminating therefrom the item of $10 for unloading dry lumber, of $7 for unloading framing, $6 for hauling lumber, and $3.95 for payment of freight on material, and sustained the exception No. 4 touching the lien of W. B. Cox and eliminating therefrom the item of $100 for right of sewer on four lots and sustained exceptions to the report allowing several judgments, one in favor of Emmons, Hawkins Hardware Company as the fourth lien, the judgment in favor of Valentine, Newcomb & Carder as part of the fifth lien, the judgment in favor of W. H. H. Holswade as one of the fifth lien, and the judgment in favor of G. A. Northcott & Co., counsel for said lienors stating in court that said judgment liens had been paid off and discharged; and sustained the exception of the Georgia Lumber Company to the said report and overruled all other exceptions; and confirmed the commissioner's report in all other things and decreed the liens upon the property as mentioned in said report as corrected and decreed that several liens be paid by said Taylor with interest on the same respectively from the 6th of September, 1903, until paid, and the costs of this suit decreed to be paid to the plaintiff including the sum of $300 for counsel fees to be taxed as part of the costs. "It is further adjudged, ordered and decreed that the said defendant C. B. Taylor do within thirty days from the rising of this court, pay unto the said W. J. Williamson, J. H. O'Niel, W. B. Cox, The Georgia Lumber Company, a corporation, The Bank of Williamson, a corporation, and The Keystone Hardwood Lumber Company, their said lien debts and judgments respectively as hereinbefore ascertained and adjudicated, with interest thereon *such* respective dates herein named until paid, and the costs of this suit, including the said sum of $300.00, counsel fees allowed counsel for the plaintiff for conducting this suit; and in default of such payment, it is further adjudged, ordered and decreed that the said property, to-wit, Lots Nos. 1, 2, 3, 4, and 5 in Block No.

17 in the said town of Williamson, Mingo county, West Virginia, together with the buildings thereupon situate, or so much thereof as may be necessary to pay off and discharge all of the lien debts and judgments according to their respective priorities, as hereinbefore ascertained and adjudicated, and the costs of this suit, be sold at public auction to the highest bidder at the front door of the court house of said county, on the following terms, to-wit, One-third of such purchase money to be paid cash in hand on the day of sale, and the residue upon a credit of one and two years, the commissioners hereafter appointed to take from the purchaser interest-bearing notes with good security for the deferred payments." And appointed commissioners to make sale accordingly. From this decree the defendant Charles B. Taylor appealed and made eight assignments of error. First, that the court erred in overruling the five exceptions to commissioner Hatfield's report as a whole, which exceptions are: "First: That no notice was given to the attorney for defendant of the completion of said report by said commissioner. Second: Said report was not retained in said commissioner's office for exceptions thereto, by said commissioner. Third: That said report is indefinite as to what credits were allowed the claimants of the several mechanic's liens and no statement made to show what was allowed and what disallowed. Fourth: Said report was made by the commissioner without any examination of the evidence, reported by the stenographer, a portion of said evidence having been taken in the absence of the commissioner. Fifth: That said report was prepared and typewritten by counsel of one of the defendants, W. B. Cox, who was attempting to set up a mechanic's lien against this defendant, exceptor."

As to the first, that no notice was given to the attorney for defendant of the completion of the said report by the said commissioner, and the second, that the report was not retained ten days in his office; the commissioner's report shows and closes with the statement "that the attorneys representing the various parties to this case waived the retention of this report for the usual period of ten days for exceptions thereto and agreed that the same might be filed when completed." This clearly implies that it was the intention of the parties that it should be filed without notice of its completion,

for the only object of retaining the report in the office of the commissioner for ten days is to enable the parties in interest to make such exceptions as they desire and the commissioner to "submit such remarks upon exceptions as he may deem pertinent," besides the parties filed their exceptions in court after the filing of said report, the cause not being heard until January 22nd, 1904, when it was heard as well upon the exceptions as upon the report.

As to the third exception in this group of exceptions, it will be treated with exception "Fourteenth" going to the claim of plaintiff O'Niel. As to the fourth exception mentioned, if the evidence was taken by the commissioner and in his presence it was not necessary that he should read and examine the evidence after it was written out in long hand by the stenographer, if the commissioner properly digested the evidence as it was given, which he did if he was attending to his duties properly as he was presumed to do. It is said, however, that a portion of the evidence was taken in the absence of the commissioner. The only evidence of this fact is the affidavit of H. K. Shumate who says that he was present during the taking of nearly all the depositions filed with the commissioner's report "that during the taking of said depositions said commissioner was frequently engaged in attending to business in the office of the clerk of said court, being a deputy therein, and was at different times absent from the room where taken, while same was being taken by the stenographer." He does not say that the commissioner was out of the hearing of the witness being examined; for all that appears in the affidavit the commissioner might have been in an adjoining room with the door open and while attending to something else might have heard and understood everything that the witness was saying. The presumption is that the commissioner was giving attention to his official duties as commissioner and there is not sufficient evidence of his absence and inattention to overcome such presumption.

The fifth exception "That said report was prepared and typewritten by counsel of one of the defendants, W. B. Cox, who was attempting to set up a mechanic's lien against this defendant, exceptor." In support of the fourth and fifth exceptions the exceptor filed the affidavit of Bert Shumate the stenographer who took down the evidence and states that

he did not deliver to the commissioner the evidence transcribed until September 15th, 1903, after the commissioner had informed him that he had completed his report, "except that part of the evidence relating to the lien of plaintiff, which was delivered to the commissioner before the remainder." That part of the affidavit which is supposed to be the foundation of the fifth exception is "The affiant would further state that he was informed by D. W. Brown, one of the attorneys for the plaintiff, that B. B. Campbell, of counsel for the defendant, W. B. Cox, wrote the report for said commissioner." This is a mere second-hand statement as to what he had been told had been done. The commissioner would be entitled to constitute anyone his amenuensis to write his report at his dictation. It is not shown that he had employed or authorized the said Campbell to prepare his report for him, it is not stated in the affidavit as it is in the exception "that said report was prepared and typewritten by counsel of one of the defendants," but merely that he "wrote the report" for said commissioner. A decree entered by the circuit court is a decree of the court, and yet it is the common practice for the attorney representing the party in whose favor the decree is rendered to prepare and submit the decree to the court which, if found correct, is entered by the court as its decree. Likewise, the commissioner in making his report makes his calculations and arrives at his conclusions and may authorize anyone to write out the same under his direction and supervision. It is not essential that he should write out his report in his own handwriting.

The next exception is: "First: That said pretended lien is defective and invalid, for the following reasons: 1st. That said pretended account is not itemized as the law provides,—especially as to the item of $875.00 for erecting and constructing third story addition to the building mentioned in said lien, and making alterations and improvements in the first two stories thereof—there being no specific contract for said work, at said sum. 2nd. No dates are given for any of the different jobs of work done on said building. 3rd. That the owner of said building and lots mentioned in said lien are not shown or stated therein, as required by statute." As to the item of $875.00 the statute does not in a contract directly with the owner of the property require an itemized account of the

work and material furnished, but the lienor shall file with the clerk of the county court of the county in which the property is situated "a just and true account of the amount due him, after allowing all credits together with a description of the property intended to be covered by the lien sufficiently accurate for identification, with the name of the owner or owners of the property, if known, which account shall be sworn to by the person claiming the lien or some person in his behalf." In Phillips on Mechanic's Liens, section 353: "If the statute giving the lien do not require the notice to itemize the work or materials, it will not be necessary."—Citing *Patrick* v. *Smith*, 120 Mass. 510, and gives an example, "Where the provision was that there should be filed 'a just and true account of the demand due him after deducting all proper credits and assets,' etc., it did not require the items to be set out; a general statement of the demand, showing its nature and character, and the amount due or owing thereon, would be a compliance." *Brennan* v. *Swasey*, 16 Cal. 140; *Selden* v. *Meeks*, 17 Cal. 128. Counsel for defendant Taylor cites the case of *Shackleford* v. *Beck*, 80 Va. 573, where it is held: "The statute requires that a contractor seeking to secure the benefit of its provisions, shall file in the clerk's office an account (which is an itemized or detailed statement of the transactions to which it relates) of work done and material furnished; and, therefore, a paper in the following words, viz.: 'To balance of account rendered for work done and material furnished for your house,' is not sufficient to create the lien provided by the statute." It will be seen that this decision is under a statute different from our own. In that case the lienor is required to file, within the time specified after the completion of the work, in the clerk's office among other things "a true account of the work done or material furnished," while our statute requires "a just and true account of the amount due him after allowing all credits." Counsel also cite several cases from Pennsylvania and one other case under the Virginia statute, *Withrow Lumber Company* v. *Glasgow Investment Company*, 101 Fed. Rep. 863; also a case from Iowa and one from Nebraska, all of which are under different statutes from ours and are not here controlling. As to the item of $875.00 in plaintiff's lien, it is set out in the mechanic's lien, exhibited with the bill.

"To erecting and constructing third story addition to the said building, making alterations and improvements in the first two stories thereof as per contract, $875.00."

Plaintiff in his testimony concerning different items swears to the correctness of it and says they had no contract for that work as to the price to be paid for it, that Taylor told him to go ahead and do it and charge what was right and he did so. This was for erecting and constructing a third story addition to the building making alterations and improvements on the first and second stories, for which the sum of $875.00 was charged and he states that when he gave C. B. Taylor his account the only item that "he kicked on" was the item of $10 for a plank walk around the building. It is objected that no dates are given for any of the different jobs. This was a running account for a large amount of work done upon the building and appurtenances commencing in the summer of 1902 and it was shown that the work was completed on the 2nd of December, 1902. In some of the cases cited by defendant's counsel the dates of performing the work and furnishing the material are required by the statutes to be given, but the only date material under our statute is as to the time the work was completed or the last of the material furnished and it is proven in the case of each and all of the liens herein that the work and material furnished as to the last item necessary to the completion of the work were furnished and performed within the sixty days before the filing of the lien as required by the statute. The item of $275.00 for building and digging a cellar it is claimed was done under a specific contract and was completed in the summer of 1902, that no lien was filed therefor within sixty days, therefore it should not have been allowed. The record shows that this work was carried on along with the rest of the work and in connection with it and was a part of the improvements put upon the same property, and the fact that a specific contract was made for any particular part of the work has no significance and does not change the fact that the improvements were being put upon the same property at the same time and it was entirely proper to include all the work in one account. The question is, at the completion of the work what was due and still owing for the work performed for which a lien might be taken? If the contract for the item of $275,00, being as claimed a specific con-

tract, could not be included in the lien because of that fact, then under a contract for the performance of certain work any change made in the plan which change would be under a specific contract for a stated amount would also preclude such change from the benefit of the general lien for the work because under that theory everything in the nature of a specific contract during the performance of the work would have to be the subject of a separate lien. This exception is not well taken.

The sixth exception is the item of $35.00 charged for the construction of a fence around the hotel building, and the seventh exception is an item of $10.00 for constructing a board walk around the same. Our statute, section 2, chapter 75, Code, provides the lien "for constructing, altering, repairing or removing a house, mill, manufactory, or other building, appurtenances, fixtures, bridge, or other structure by virtue of a contract with the owner or his authorized agent." In *Henry* v. *Plitt*,, 84 Mo. 237, it is held: "Our statute gives a lien for fences and walks on the premises, when they have been constructed as appurtenant to the buildings, and at the same time." In this case, the Judge when rendering the opinion, says: "They have been so adjudged in other states under statutes more limited in the words employed than our own." And in *McDermott* v. *Claas*, 104 Mo. 15: "Where walks and fences are constructed under one entire contract for the erection of a building, the mechanic has a lien for the labor and material expended on them." The board walk and the fences around the house are appurtenant to and necessary for the convenient use and occupancy of the building and are properly covered by the lien.

The eighth exception is as to the item of $50.00 for erecting and constructing a sample room. It is contended that this item should not be allowed because it was a distinct contract and building. It was built in connection with the hotel and as a part of it and for the reason given in relation to the item of $275.00 the same was properly overruled. The same applies to the eleventh exception to the item of $35.00 for the erection and construction of a coal house and as to the twelfth exception to the item of $16.00 for erecting and constructing a cross-fence, the same was properly overruled for the reasons given as to the sixth and seventh exceptions

touching the fence around the building and the board walk.

The thirteenth exception goes to the items of $20.40 for twelve hundred feet of ceiling and $12.00 for hanging doors to closets and building claiming that these items were under special contract and should have been the subject of a separate mechanic's lien, and the exception is not well taken for the reasons before given with reference to such special contracts.

The fourteenth exception is as follows: "Fourteenth: The commissioner refused to allow undisputed credits which should have been given exceptor. The Thacker work and work on office amounts to $852.50, crediting the two checks of $250.00 each on Thacker work would leave $352.50 due for which no lien is set up in this case. The other credits amount to $1,523.55 and were to be credited on the Moose Hotel (see depositions of Taylor, page 49) reducing amount for removing house, $800.00. This would leave to go on said lien $723.55 instead of $200.00, which seems to have been deducted from lien by commissioner. All the disputed credits were disallowed. It was also shown that the item charged of $875.-00 was exorbitant, and three carpenters jointly testified that about $600.00 was fair estimate for such, after adding twenty per cent thereto for contractor. This large preponderance should have reduced that item at least $275.00; other items were likewise shown to be overcharged—commissioner failing to give any credit for such overcharge." This exception involves many credits claimed by defendant on account of the mechanic's lien of plaintiff. Considerable evidence was taken concerning these matters and was very conflicting. The defendant filed many checks paid to plaintiff some of which he claimed were to be applied on the plaintiff's mechanic's lien, and the commissioner failed to mention or pass upon any item of credit so as to enable the court to determine whether the same were properly allowed or rejected, nothing to show what credits, if any, other than those allowed, and they do not appear, should have been applied to the payment of the mechanic's lien and which were claimed by defendant should be so applied, and does not designate a single credit claimed and disallowed. In *Gage* v. *Arndt*, 121 Ill. 491, it is held: "Not sufficient on such a reference to report the testimony *en masse*, and the amounts in the aggregate, with no reference to items

claimed and disallowed." *Ransom* v. *Davis*, 18 How. (U. S.) 295; *Dewing* v. *Hutton*, 40 W. Va. 521; *Hanley* v. *Potts*, 52 W. Va. 263. The exception fourteen should have been sustained.

The rest of the exceptions taken to the report are to the account or lien of defendant Cox and the exceptor refers to the first five general exceptions made to the lien of the plaintiff and are adopted by the exceptor here. These have already been disposed of. The second exception is, "That the account filed is insufficient and uncertain. The same shows not only work done on the Moose Hotel, but upon Sample Room, Coal House, and Sewer Work for which no lien can be had upon said building." The sample room and coal house, as we have seen, are appurtenant to and a part of the hotel. In 20 A. & E. E. L., 310, it is said: "In Massachusetts it has been held that a mechanic's lien may be acquired for the construction of a drain pipe from the cellar of a house into a sewer in the street, for such drain pipe is a part of the house." In the Massachusetts case referred to Judge Allen says: "The piping, inside of the house, and outside of it to the sewer, was necessary to the use of the house and a part of it, and was included in the contract for building it. The house would be incomplete and unfinished without the pipe, and it would pass by a deed of the house as a part of it. It is immaterial whether it was inside or outside the walls of the house, or whether it extended one foot or thirty feet." It is as much a part of the house and equally as essential as a chimney or a flue to carry off the smoke. Indeed, the house could not be used without it. The third exception to the lien of defendant Cox is as to the item of $475.00 for heating contract, boiler $50.00, and four radiators $40.00. This was claimed to be under a separate and distinct contract for a specific sum and was completed more than sixty days before filing of said lien, and claiming that the heating could not be tacked upon the plumbing contract so as to bring it within the sixty days. The same argument applies to this as to the items of $875.00 and $275.00 in the lien of J. H. O'Niel. The account of Cox was a running account beginning July 4th and ending December 10th, 1902. The sixth exception is that the whole plumbing account on the hotel should not be allowed because not filed within sixty days, but

we have seen that it closed on the 10th day of December, 1902, and was filed and recorded on the 9th day of February, 1903, this would be more than sixty days between the 10th of December and the 9th of February, but in the year 1903, the 8th of February happened on Sunday which under the statute not being counted brought the filing and recording within the sixty days. The seventh exception to the Cox lien which is as follows: "Seventh: If the lien was well taken the commissioner has failed to give credit for undisputed payments and off-sets: Commissioner only decreased said lien from $1,544.57 to $1,346.44, less than $200.00—in some way. A check for $100.00 at first positively denied but afterwards admitted; and a judgment of $268.33 paid for Cox by defendant, which judgment was for material including in plumbing—making $368.33 which should have been allowed instead of one less than $200.00:" is subject to the same criticism as exception fourteen to the claim or lien of plaintiff O'Niel as far as it concerns the failure to show what claims of credits were disallowed and which allowed. The eighth exception to the lien of defendant Cox is that the commissioner did not allow an abatement or recoupment for the failure of the heating apparatus to heat the building and a large abatement for bad plumbing. There was a good deal of testimony offered by defendant to prove the heating apparatus to be very defective and its failure to do the service it was intended to do, and on the other side to prove that it was entirely efficient when managed and controlled by one who understood it; there was evidence tending to prove that the defendant for a time had an ignorant inefficient negro in charge of the heating apparatus, and that when he discharged him he employed an indolent, careless white man who was but little, if any, better, sometime drunk and sometimes away from his duties. The evidence touching the efficiency of the heating apparatus and also the quality of the plumbing was very conflicting, and the commissioner having found for the lienor on this matter and his finding having been confirmed by the court, this Court will not disturb the decree in that respect.

It is assigned as error to decree the mechanic's lien of O'Niel and Cox, if they are held to be liens at all upon Lots Nos. 1 and 2, as the Hotel Moose is claimed by defendant

Taylor to be located on Lots Nos. 3, 4, and 5. I find no evidence as to the location of the hotel on the square of ground as far as the numbers of the lots are concerned. The whole of Lots Nos. 1, 2, 3, 4, and 5 of Block 17 constitute one lot or piece of ground 125x100 feet and it nowhere appears in the record that it is located on any particular part of said ground. The deed of trust of July 31st, 1903, executed by Charles B. Taylor to Charles H. Jones, trustee, conveys "Lots Nos. 3, 4, and 5 of Block No. 17 as shown on the plat of the said town of Williamson and being what is locally known as Hotel Moose." This is the deed of trust given to secure to the Bank of Williamson the sum of $4,000.00. The mechanic's liens describe the property upon which the hotel is located as Lots Nos. 1, 2, 3, 4, and 5 and if the hotel had been confined to Lots Nos. 3, 4, and 5 or any other particular lots in said plat of ground it would have been an easy matter to show it. The property was conveyed by W. J. Williamson and wife by deed dated the 6th day of May, 1902, to Charles B. Taylor as Lots Nos. 1, 2, 3, and 5 and an undivided half interest in Lot No. 4; and on the same day Parlee Williamson and husband conveyed to said Taylor the one undivided half of said Lot No. 4. It is true that defendant Taylor in his answer says that the building is situate on Lots Nos. 3, 4, and 5 but not on Lots Nos. 1 and 2 or either of them, but there is a replication to his answer and no proof taken on that point. It would appear from the record that the whole plat or block was under one enclosure.

The sixth assignment of error is that the court decreed the sum of $300.00 as counsel fees for the plaintiff. This is conceded to be erroneous and is not contended for by the defendant, but it appears from a supplemental record brought up on *certiorari* that the defendant gave notice that he would move to correct the decree by setting aside that part of it decreeing the said $300.00 and tendered and filed in the clerk's office in vacation on the 16th day of June, 1904, a release of said decree for said $300.00, but the circuit court refused to take any action upon it because it said it was without jurisdiction while the case was pending in the supreme court of appeals.

The seventh error assigned is the overruling of plaintiff's

demurrer to the bill setting up the liens. This is disposed of by the liens being held sufficient.

The eighth assignment set out in the petition: "It was error to decree the sale of lots Nos. 1, 2, 3, 4 and 5, for the payment of the liens adjudged in favor of the Bank of Williamson on one of said liens, to-wit, the sum of $4,000.00, as it did not consist in a lien against lots Nos. 1 and 2." This assignment is well taken because the deed of trust to secure the $4,000.00 was only executed upon the three lots Nos. 3, 4, and 5 and did not include lots Nos. 1 and 2. The commissioner's report as well as the decree was correct in that regard except that part of the decree which provides for the sale and it should not have decreed the sale of the whole property together, but the three lots Nos. 3, 4 and 5 should have been sold separately.

For the reasons herein stated that part of the decree which provides for the sale of the property and as far as the decree overruling exception No. 14 to the commissioner's report touching the mechanic's lien of O'Niel, and the seventh exception concerning the lien of defendant Cox and the allowance of $300.00, counsel fees to plaintiff, be and the same is reversed, and in all other respects the decree is affirmed; and the cause is remanded to the circuit court of Mingo county for recommittal to the commissioner to report upon the various credits which should be allowed and which should be disallowed as set out in the said fourteenth and seventh exceptions respectively; and for further proceedings to be had therein according to the principles laid down in this opinion and the rules governing courts of equity.

Affirmed in part. Reversed in part.

CHARLESTON

SPIES *v.* BUTTS *et al.*

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Submitted February 8, 1906. Decided April 10, 1906.

1. APPOINTMENT OF RECEIVER.

The application for the appointment of a receiver is addressed to the sound discretion of the court. The appointment is not a matter of right. The power is a discretionary one to be exercised with great circumspection. The discretion is not arbitrary or absolute, but sound and judicial; not to be too strictly limited, or lightly used. (p. 397.)

2. RECEIVER—APPOINTMENT OF.

Where, under an executory contract of sale of many tracts of land and standing timber a cash payment is made and the purchaser agrees to give notes for the deferred monthly payments and takes possession of the subject of his purchase and proceeds to cut and manufacture into lumber and remove therefrom the timber and market the same as provided in the contract, but refuses to make any further payments on the purchase money or to make the notes therefor as required by the contract because of defect of grantor's title tendered to the purchaser; the timber being the chief value of the land and unless operated the title to much of the timber would fail because of the limited time in which it could be removed under the contracts by which it was held by the vendor. Held: Sufficient ground for the appointment of a receiver on the application of the vendor. (p. 398.)

3. EQUITY—*Executory Contract—Payment of Purchase Money—Retention of Timber.*

Where the purchaser under such contract has continued in possession cutting, manufacturing into lumber and removing the timber, refusing to pay anything on account of the purchase-money, and refusing to make the notes for the monthly payments of the purchase-money as required by the contract; equity will give the vendor a right to hold the manufactured product remaining on the premises liable to the purchase money past due him. (p. 407.)

4. TAXES—*Purchaser in Possession to Pay Taxes.*

A purchaser in possession of land under an executory contract of sale is liable as between himself and the vendor for all taxes assessed on the land after the commencement of his possession, in the absence of a stipulation to the contrary. (p. 403.)

Appeal from Circuit Court, Upshur County.

Bill by Henry Spies against Ida M. Butts and others. Decree for plaintiff and Ida M. Butts and others appeal.

Affirmed.

W. G. BENNETT, C. WOOD DAILEY, E. H. MORTON and G. M. FLEMING, for appellees.

W. W. BRANNON, DAVIS & DAVIS, and V. B. ARCHER, for appellants.

MCWHORTER, PRESIDENT:

On the 28th day of January, 1904, Henry Spies of the county of Randolph entered into a contract with Ida M. Butts, James McCormick and Harry T. Wilson to sell to the said parties of the second part all the real estate and personal property owned by him in the counties of Randolph, Upshur and Webster as follows:

"(a) All of the several tracts of land, coal and standing timber lying and being in the said counties of Randolph, Upshur and Webster in the said State on the waters of the Little Kanawha, Buckhannon and Holly Rivers and their tributaries which are shown upon the schedule and blue print map hereto attached and made a part of this contract, together with all other tracts of land, town lots, coal or standing timber owned by the said party of the first part in the several counties aforesaid or any of them, whether shown upon said schedule and map or not, the whole aggregating 10,699.25 acres of land, 16,059.02 acres of standing timber, and 14,867.34 acres of coal.

"(b) All of the personal property owned by the party of the first part in the counties aforesaid or either of them, consisting of manufactured lumber, fallen timber or logs, tools, machinery, store goods, and other personalty, whether of the character so designated or not, save and except the following: 4,000 feet of figured maple lumber; 2,800 feet of bird's eye poplar; 1,500 feet of quartered oak; two second-hand boilers; one riding horse; one cow; one typewriter; books, book-accounts, monies, stocks, securities and choses in action and household goods.

"(c) All of the capital stock of the Pickens and Hackers Valley Railroad Company.

"It being the intent and purpose of this contract to sell unto the parties of the second part all of the estate of the party of the first part both real, personal and mixed in the counties aforesaid or either or any of them, save and except only those items of personal property hereinbefore excepted and reserved. It is further understood that the acreage of

said realty is estimated by surface and not horizontal measurement, and that the acreage of land, coal and timber are not exclusive each of the other, but that the same tract may and in many instances does constitute a part of the aggregate total given under one or more of such descriptions."

The parties of the second part agreed to pay the sum of $400.000 as follows: $62,500 in cash upon the signing of the agreement and $37,500 in six months thereafter for which the parties made their notes of the date of said agreement, which notes were to be further secured by the deposit with the said Spies as collateral security the one-tenth of the total capital stock to be issued by the parties of the second part upon the formation of a corporation to which they proposed to convey the property and which corporation was to be immediately organized by them; the residue of the purchase price, $300,000, was "to be secured or evidenced by the notes of said proposed corporation to be endorsed by the parties of the second part and to be due and payable," the sum of $2,500 on or before the 1st day of May, 1904, the second a like sum on the 1st day of June, 1904, "and the residue to be divided into 59 notes for the sum of $5,000 each and due and payable on or before the first day of each month thereafter, all to bear interest at the rate of five *per centum* per annum from and after the 1st of November, 1904;" and as further security it was provided that in his deed to be thereafter made for the property, Spies should retain his vendor's lien on all the said real estate, and a deed of trust was to be executed by the said Pickens and Hackers Valley Railroad Company upon all its real estate, rights of way, rolling stock, equipment, rights and franchises to secure the payment of the same, the execution of which deed of trust was to be contemporaneous with the transfer to the parties of the second part of the capital stock of the said corporation; the party of the first part agreed to make, execute and deliver to the parties of the second part, or to such person, persons or corporation as they might designate, as soon as might be after the execution of the contract and not later than the 1st day of July, 1904, a good and sufficient deed for all said real estate with covenant of general warranty and free from all encumbrances, together with such bill or bills of sale for the personal property as the parties of the second part might request or desire; the

parties of the second part were to have full and complete possession of all said personalty and title thereto immediately upon the payment of the said sum of $62,500 and the execution of the notes for the $37,500 together with the right to enter in and upon the real estate and to cut and remove the timber therefrom, or the coal thereunder, and to operate, use and control the said railroad and to receive and collect the revenues arising therefrom; and in the event of the said Spies not being able to deliver to the parties of the second part the total acreage of land, coal or standing timber described, in that event there should be abated from the purchase price therein agreed upon the sum of $3.00 per acre for each acre of surface so conveyed, $7.00 per acre for each acre of coal, and $19.00 per acre for each acre of standing timber or an aggregate sum of $29.00 per acre for each acre of land containing both coal, standing timber and surface; or, if the title should fail as to any portion so conveyed, a like abatement and no more should be made upon such failure. It was further understood and agreed that if said Spies should be unable by the 1st day of July, 1904, or at the time of the delivery of the deed mentioned, to make good title to any of the tracts of the land, coal and standing timber intending to be conveyed by said agreement, the same might be conveyed by him to the parties of the second part at any time before the final settlement should be made of the purchase price therein agreed upon upon the perfecting of his title thereto and no abatement should be made of said purchase price by reason of any such tracts so conveyed before final settlement. The said Spies further covenanted that there were no liens or encumbrances upon any of the personal property and that the description of the same should be taken and held to include the locomotive engine then lately ordered on behalf of said railroad company and not yet then delivered to it.

On the 4th day of August, 1905, Henry Spies filed his bill of complaint in the circuit court of Upshur county against Ida M. Butts, James McCormick, Harry T. Wilson, as individuals in their own right and as partners trading under the firm name of the Butts, McCormick and Wilson Company, The Pickens and Hackers Valley Railroad Company, a corporation, The Butts, McCormick and Wilson Company, a corporation, the Ohio River Lumber Company, a corporation,

and the Oak Lumber Company, a corporation, alleging that for many years prior to the date of said agreement plaintiff was extensively engaged in the lumber business in the counties of Randolph, Webster and Upshur and that while so engaged he became the owner of a large amount of property both real and personal; the real consisting mainly of coal, timber and timber lands in said counties; that the personal property consisted largely of manufactured lumber, fallen timber or logs, tools, machinery and store goods; that for the purpose of successfully carrying on his said business it had become necessary for him to construct the said railroad and for the more efficient management thereof he formed the corporation called the Pickens and Hackers Valley Railroad Company in which he owned all the capital stock except thirteen shares of which plaintiff's wife owned ten shares and G. M. Fleming, A. I. Boreman and E. F. Kummer owned each one share; that shortly before the 28th day of January, 1904, the said Butts, McCormick and Wilson entered into negotiations with him for the purchase of his entire holdings with the exceptions specified in the agreement, which negotiations were consummated on the 28th day of January, 1904, when the said agreement was entered into; that the consideration of said agreement was the sum of $400,000 made up as follows:

"Personal property of the value of forty-one thousand eight hundred and ninety-six dollars ($41,896.00); the Pickens and Hackers Valley Railroad of the value of sixty thousand dollars ($60,000.00); the equipment of said road of the value of fourteen thousand and three hundred and eighty-seven dollars ($14,387.00); land exclusive of coal and timber, of the value of thirty-two thousand and ninety-seven dollars ($32,097.00); coal land of the value of one hundred and four thousand and seventy-six dollars ($104,076.00); *timber on lands, of the value of one hundred and forty-five thousand seven hundred and ninety-four dollars* ($145,794.00); the residence and lot and store house of the plaintiff in the town of Pickens, of the value of seventeen hundred and fifty dollars ($1750.00); amounting in the aggregate to the said sum of four hundred thousand dollars ($400,000.00).

The bill alleging that the provision in the contract in regard to abatement for failure to deliver the total acreage was inserted in said contract by reason of a mutual mistake

of calculation; that it was not intended that the abatement for standing timber should be $19.00 per acre but only $9.02, the latter being the price per acre for timber; that the defendants took possession immediately of all the property except the house in Pickens which the plaintiff was willing to deliver whenever the defendants complied with the contract; that the defendants had paid the sum of $62,500 and had paid the note for $37,500 and had also paid a note of $2,500 due May 1, 1904, and $900 on the note for $2,508 due June 1, 1904, but that except the sums named the entire purchase money remained unpaid although the sum of $71,600 with interest from November, 1904, was past due; that the defendants had failed and refused to execute the 59 notes for $5,000 each; and had failed in good faith to form the corporation provided for by the contract; that within the last few days he had learned that the defendants by deed dated June 20, 1905, had conveyed all the personal and real estate to a corporation stated in the deed to have been organized under the laws of the State of South Dakota but denied that the said corporation had complied with the laws of West Virginia which would enable it to carry on business, and alleged that such action was taken as a mere pretense of compliance with the provisions of the contract and for the purpose of hindering, delaying and defrauding the plaintiff in the protection of his rights; alleging that the defendants were manufacturing and selling the lumber from the said property and using the money collected in carrying on other enterprises instead of paying the plaintiff; that the defendants were so conducting their operations as to work irreparable damages and loss to the plaintiff, that the defendants knew when they entered into the contract that a very considerable part of the timber sold had a time limit within which it was to be removed and that instead of removing the time limit timber they were removing timber on land which he owned and on which there was no time limit, and by so doing would permit the time to expire with the idea of purchasing the same after the limit had expired at a much less price, that they had manufactured lumber of the market value of $120,000; that the defendants were using the portable mills and tools sold them in the manufacture of lumber on tracts adjacent to the land purchased

of the plaintiff and alleging that the mills and tools should be used in the manufacture of lumber on the tracts of lands purchased of him, and the money should be used in the payment of the purchase money due him; that the defendants were concerned in other corporations engaged in the manufacture of lumber on adjacent tracts of land and that said corporations were formed for the purpose of hindering, delaying and defrauding plaintiff in the assertion of his rights; alleging that the defendants were inexperienced in the lumber business and that the business was being carried on at a loss; that the defendants had not caused the railroad company to execute a deed of trust on its property and that he was ready to transfer all the stock in the said company to the defendants; that the plaintiff had executed and tendered to the defendants a good and sufficient deed for all the real estate sold by him to them, and that the defendants had refused to accept the same; that when the said deed was presented to them they assigned a number of reasons for not accepting the same, that the deed did not comply with the requirements of the contract; alleging that it was true that of the real estate amounting to 2943.81 acres the plaintiff only owned an undivided half but that the defendants knew this when they entered into the contract and that in estimating the acreage only one-half of this tract was taken; that it was true that in some cases he owned only certain marked trees, and that in one tract of 670 acres he only owned one-half of the coal but that this was known to the defendants before making the contract; and alleged that such objections were not made in good faith but only for the purpose of hindering and delaying the day of accounting that the defendants might further despoil the property of the plaintiff; that since the tender of the said deed and the refusal by the defendants to accept it the defendants had continued to cut and manufacture and remove the timber, by reason of which the defendants were estopped from denying their obligation to accept the said deed; that since the formation of the South Dakota corporation he was unable to say whether the operations had been carried on by the defendants as the firm or as the corporation, but that there had been no apparent change in the management of the busines and that the plaintiff did not believe that there had in

fact been a change in ownership but that the whole proceeding had been taken for the purpose of hindering, delaying and defrauding the plaintiff, that no one had set up any adverse title of claim to any of the property embraced in his sale, but that it was true that as to one or two small tracts he had only the equitable title but that he could and would obtain the legal title to such tracts, and that even should the plaintiff fail to get good title to such tracts such failure should not interfere with the closing of the contract and would only entitle the defendants to refuse to take so much of the property as the plaintiff could not make good title for; that in making out the bill of sale of the personal property there had been omitted therefrom credits to the amount of $1,075, mentioning the items thereof; alleging a purpose on the part of the defendants to exhaust the personal property conveyed to them, to sell and convert to their own use the standing timber conveyed to them without paying to the plaintiff anything further than they had already done, and that if permitted to longer mismanage the business the plaintiff would be deprived of a large part of the security for his debt and would not be able to enforce his lien on said property; that the defendants had refused to pay taxes for the year 1904 on the real estate conveyed to them by plaintiff and that unless redeemed the same would be sold by the state; that in order to prevent such sale he had been compelled to pay a part of the taxes thereon and that the defendants refused to refund to him the amount so paid; that the land sold was rough and not suited for agricultural purposes and that the timber thereon constituted the chief value, that the coal lands had depreciated in value and that when the land was denuded of its timber it would be wholly insufficient to satisfy the purchase money lien of the plaintiff; alleging that the defendants were insolvent. and praying that the said contract of January 28th, 1904, be corrected so as to express the true meaning and intent of the parties; that the plaintiff have a decree for the amount due him; that his lien be enforced; that a receiver of the said property be appointed; that said receiver be authorized to carry on the business of manufacturing into lumber the standing timber and the timber then down; and that an injunction be granted

enjoining and restraining the said defendants both individually and as a firm from cutting the timber or removing any part of it that had already been cut, or to sell any that had been manufactured, and that they be enjoined from interfering in any way with the receiver in the operation of the business.

The plaintiff gave notice of motion for the appointment of a receiver and the defendants gave notice of their motion to dissolve the injunction. The defendants Butts, McCormick and Wilson and Butts, McCormick and Wilson Company filed their joint and several answer on the 26th day of August, to which plaintiff replied generally. The answer averring that the contract as set out in the plaintiff's bill was correct; that there was no separate valuation of the different items, but that it was a sale in gross for the consideration of $400,000; denying the allegation in regard to the abatement of $9.02 for standing timber, but that it was intended to be abated $19.00, as set out in the contract, and denying that the fixing of $19.00 as the abatement was a mutual mistake; that the plaintiff had refused to deliver to them possession of the house at Pickens and that after the execution of the contract plaintiff fraudulently sold and disposed of certain lumber covered by the contract falsely pretending to have sold the same prior to the execution of the said contract; that the defendants had paid the plaintiff $105,525.07, and had put improvements on the property to the amount of about $70,000 and denying that they owed the plaintiff $71,600, but that they had paid already more than was due; that they had formed the corporation in South Dakota and had conveyed the said property to the corporation and the formation of the corporation was in pursuance of the terms of the contract and was organized in good faith; that it was true that the defendants had refused to execute the 59 notes of $5,000 each, but that their failure was due to the failure of the plaintiff to tender them a deed in compliance with the contract; denying that they were applying the proceeds of the property sold to them by the plaintiff to other enterprises with the intention of defrauding the claim of the plaintiff; denied that it was required of them to remove the timber off the time limit tract rather than off the other tracts, but that they could cut timber where most con-

venient, and that on account of the location it would be impossible to cut and manufacture all the timber within the time on which there was a time limit; that the plaintiff never requested them to cut the timber from the time limit tracts rather than that on which there was no time limit; denying that they were inexperienced in the lumber business and claiming that their net profits since commencing business amounted to $82,000; that they had never executed a deed of trust to Spies for the railroad because Spies was the holder of all the corporate stock of the railroad; that plaintiff had tendered the deed to them, but that they had refused to accept it and filed with the plaintiff a list of objections to the same and assigned a number of reasons for not accepting the deed; that they knew at the time of the contract that plaintiff only owned a half undivided interest in a tract of 2943.81 acres, but did not know of other deficiencies of title and encumbrances and that they relied solely on the contract of plaintiff to convey to them with general warranty; denying the insolvency of the defendants, but on the contrary that the assets exceeded the liabilities by the sum of $157,316.66; and denied that the security of the plaintiff for his purchase money was being removed, but averred that instead they had increased the value of the real estate $39,660.85; denied that any purchase money was due plaintiff, but that after deducting abatements and credits for improvements the defendants would be credited with additional purchase money, alleging that they had always been willing to comply in all things with the terms of the contract, and praying for the specific performance of the contract, and asked that a commissioner be appointed to ascertain and report the total number of acres of land, coal and timber, which the plaintiff is able to convey in accordance with the said contract and the condition of the title of plaintiff to the several tracts.

On the 9th day of September, 1905, the cause came on to be heard upon the bill and exhibits, the answer and exhibits and replication to the answer, upon the motions to appoint a receiver and to dissolve the injunction, upon the several affidavits filed in support of the plaintiff's motion for receiver and in opposition to the motion to dissolve the injunction and the affidavits filed by defendants in support of their motion to dissolve the injunction and in opposition to the motion to

appoint a receiver. When the court was of opinion that the case was one proper for the appointment of a receiver, and proceeded to appoint Clarence D. Howard receiver of all and singular the real estate in the bill and exhibits mentioned and the assets both real and personal of the said railroad; the stock of manufactured lumber on the premises in controversy, or so much thereof as had been manufactured by defendants from the timber cut on the lands purported to be sold by plaintiff to defendants or from the standing timber sold by him to them, together with any such timber severed from the land and not manufactured into lumber; and it was decreed that upon giving bond as required in the penalty of $50,000 said receiver should forthwith take into custody the said property to sell and dispose of the said stock of manufactured lumber retaining the proceeds thereof until the further order of the court, to operate and conduct the business of the railroad in question and all tram roads constructed by the parties hereto upon the lands in controversy; to employ such agents, clerks and servants as he might deem necessary therefor, and to go forthwith upon the premises and investigate and report to the court all matters touching the propriety or necessity of cutting any or all of the standing timber in controversy, the probable cost thereof, and the advisability of such operation under the order of the court.

"It is further ordered that the receiver shall from time to time report what he shall do hereunder and not less often than twice during each year of his said receivership.

"And the Court is further of opinion and doth overrule the motion of the defendants for the dissolution of the injunction hereinbefore awarded, in so far as the same enjoins the defendants from selling or otherwise encumbering the real estate described in the bill herein, or from removing, selling or shipping any lumber manufactured from any of the timber sold by the plaintiff to the defendants, but doth dissolve said injunction so far as the same restrains the defendants from selling or encumbering any part of the personal property in the bill mentioned and covered by the contract of sale between the plaintiff and defendants; but it is ordered that the plaintiff do enter into further bond within 10 days from this date in the penalty of $2000.00-100, conditioned upon the payment of all costs and damages as may be encurred by

any party hereto in the event the said injunction shall be hereafter dissolved.

"And the defendants now desiring to set aside so much of this order as appoints said receiver, and refuses to dissolve said injunction by the giving of an appropriate bond as hereinafter provided, it is ordered that upon the defendants or some one for them entering into bond with approved security, either individual or corporate, before the clerk of this Court, within 14 days from this date in the penalty of $150,000.00, conditioned upon the payment to the plaintiff of such moneys as may be found due to him upon future decree in this cause, said receivership be thereby vacated and that the injunction herein do stand dissolved. And it is further ordered that the said receiver heretofore appointed do not take possession of any of the said property within the said period of 14 days limited for the giving of such bond."

From which decree the defendants Ida M. Butts, James McCormick, Harry T. Wilson and Butts, McCormick and Wilson Company appealed and claim that the court below erred in appointing a receiver; that the court erred in holding that the plaintiff had a lien upon the manufactured lumber on the premises and in appointing a receiver therefor; and in directing the receiver to sell the same; that the court erred in overruling the motion to dissolve said injunction; and erred in fixing the amount of the bond to be given by the defendants at $150,000, the same being unreasonable and excessive in amount.

Did the court err in appointing a special receiver in case at bar in view of all the circumstances of the case? Sec. 28 ch. 133, Code, makes provision for such appointment by a court of equity in any proper case pending therein in which the property of a corporation, firm or person is involved and there is danger of the loss or misappropriation of the same, or a material part thereof. Sec. 6823, 5 Thomp. Corp., says: "Unless there is a statute giving the right to a receiver in a given state of facts, no one can demand the appointment of a receiver *ex debito justitiae;* but the question whether or not a receiver will be appointed in a given case is addressed to the sound discretion of the chancellor, under all the circumstances. The discretionary power possessed by courts of equity of appointing receivers or refusing applications for

such appointment will not be interferred with on appeal except in cases where the discretion has been manifestly abused; this being the general rule as to the appellate review of discretionary action." And Alderson on Receivers, page 75: "The application for the appointment of a receiver is always addressed to the sound discretion of the court. The appointment is not a matter of right. The power to appoint a receiver is a discretionary one to be exercised with great circumspection. The discretion is not arbitrary or absolute, but sound and judicial. It is not to be too strictly limited or lightly used."—Citing many cases in support of the principle. In *Crane* v. *McCoy*, 1 Bond. 422 U. S. Cir. Ct., it is held: "The application for the appointment of a receiver is always addressed to the sound discretion of the court to which it is made. As a general rule such appointment will be made in all cases where the interest of parties seem to require it." In *Cameron* v. *Improvement Company*, 20 Wash. 169, 72 Am. St. Rep. 26, it is held: "The appointment of a receiver *pendente lite* is a matter committed to the sound discretion of the judge before whom the proceeding is pending." And it is there further held: "The appointment of a receiver will not be disturbed on appeal, unless it appears affirmatively to have been unwarranted, and to show this there must be a great preponderance of evidence against the propriety of the appointment, as the appellate court will not undertake to weigh the testimony where there is substantial conflict in it." In a note to said case at page 96 it is said that the appointment of a receiver is proper where it is sought to enforce a vendor's lien and there is danger of loss by the purchaser's insolvency or otherwise, citing *Hughes* v. *Hatchett*, 55 Ala. 631. In *McCaslin* v. *State*, 44 Ind. 151, it is held: "Where a purchaser takes possession of and claims real estate by virtue of his purchase, and is in possession at the commencement of an action for the recovery of the purchase-money and for the appointment of a receiver to take charge and possession of the real estate pending litigation, because of waste committed and threatened by the purchaser, the appointment of a receiver is not such a change of possession as to estop the vendor from enforcing his remedy." See also 4 Pom. Eq. Juris., sec. 1334.

Plaintiff had been many years carrying on a heavy busi-

ness in the lumber trade and had accumulated a large number of tracts of land and of standing timber in the three counties of Randolph, Upshur and Webster, and had in connection with his business built a railroad of some 13 or 14 miles in length from the town of Pickens into his timber lands at a cost, with its equipment, of some $74,000 for the purpose of carrying his manufactured product to market. The defendants Butts, McCormick and Wilson contracted for the purchase of the whole property of the plaintiff, real and personal, including the railroad and its equipment, and at once took possession and began cutting, manufacturing into lumber the timber, and marketing the same. It was evidently the intention of the plaintiff in making the sale, and presumably that of the purchasers, from the provisions made in the contract for payments of $5,000 every month, that the timber should be paid for about as fast as it was removed. The timber constituted the chief value of the larger part of the land purchased and at the price the defendants claim they were to have an abatement for the failure of title to the standing timber and which claim is supported by the written contract as it is written, and in case it shall hereafter be found there was no mutual mistake as charged by plaintiff in fixing the amount to be abated therefor, at $19 per acre of standing timber, such standing timber being 16059 acres, at the said price, alone, would represent over $305,000, or more than three-fourths of the sum to be paid by the defendants for the whole purchase. The defendants prosecuted vigorously the cutting and removal of the timber for some eighteen months without paying a dollar on the monthly payments of $5,000 each, agreed by them to be paid, insisting that they could not be required to pay any of the deferred payments of the purchase-money until a perfect deed of general warranty for all the property was made to them by the plaintiff and free from encumbrance, and cite many authorities to support their contention. And their position in cases where the contract has been completed by giving the notes for the deferred payments so as to entitle the vendor to his liens that he may proceed if necessary to enforce payment, is the correct position and supported by their cited authorities, but it will not hold good in a case where the vendee has taken possession, and, while

refusing to carry out his contract by giving his notes and paying no part of the deferred payments of the purchase-money long past due, is taking off and appropriating wholly to his own use that element of the real estate which constitutes its chief value, as to a large part of the real estate in controversy here, the standing timber seems to constitute almost the sole value. In *Gates* v. *McLean*, 70 Cal. 42, it is held that where the contract provides for the vendee taking possession, his remedy, in case the title of the vendor fails or he is unable to make a conveyance as stipulated, is to rescind or offer to rescind and restore the possession; in which event he may recover the purchase-money advanced with interest together with the value of his improvements deducting therefrom such sum as the use of the premises may reasonably be worth, but if he chooses not to rescind but to retain possession under the contract he can do so only on condition that he pay the purchase-money and interest according to the contract. In the latter case it is considered that he is willing to receive such title as the vendor is able to give and is content with the personal responsibility of the vendor upon his covenants. And in *Rhorer* v. *Bila*, 83 Cal. 51, Syl. pt. 1: "A purchaser cannot remain in possession of lands under a contract, and at the same time refuse to pay the stipulated purchase price. He must surrender possession or show an eviction before he can defend a suit for the purchase-money, or show a failure of consideration, or counterclaim to the purchase-money, or damages for delay in performance of the contract of the vendor. So long as he retains possession he waives all objections, whether of defect of title or delay in completing it, and is bound to accept title according to the terms of the contract, if offered while he still retains possession." In *Lynch* v. *Baxter*, 4 Texas 431, (51 Am. Dec. 735): "A vendee cannot resist payment of purchase-money on ground of defect of title in the vendor, while he retains the title bond and continues in the possession of the land." In *Worley* v. *Nethercott*, 91 Cal. 512, (25 Am. St. Rep. 209), it is held: "If, after a contract is made for the sale of real property, it is ascertained that the title of the vendor is not perfect, the vendee must either rescind the contract and restore possession, or accept the title as it is and pay the

purchase price. He cannot, while declining to pay such price on account of the defect in the title, hold possession of the property until the title should be perfected." This principle is well settled. *Stave Co.* v. *Smith*, 116 Ala. 416, (67 Am. St. Rep. 140); *Gates* v. *McLean*, 70 Cal. 42; *Rhorer* v. *Bila*, 83 Cal. 51; 3 Pom. Eq. Juris., section 1260; *Giles* v. *Williams*, 3 Ala. 316, (37 Am. Dec. 692;) *Lynch* v. *Baxter*, 4 Texas 431, (51 Am. Dec. 735;) *Vail* v. *Nelson*, 4 Rand. 478; *Johnston* v. *Jarrett*, 14 W. Va. 230; *Rader* v. *Neal*, 13 W. Va. 373; *Goddin* v. *Vaughn*, 14 Grat. 125.

Counsel for appellants in their brief say: "The title of Henry Spies to the real estate sought to be conveyed is so defective and covered with liens aud encumbrances, that a court of equity will not compel the defendants to accept and pay for it." While the plaintiff in his bill says that he is advised that he is entitled to have specific performance of the contract of January 28, 1904, and that if he be mistaken in that then, that the said contract should be rescinded and the parties placed in *statu quo*, that the defendants might not refuse to carry out the contract and yet reap all the benefits thereof and refuse to pay for them. If the deed tendered by plaintiff to the defendants for the property sold them by him is liable to all the criticisms and objections raised against it by the defendants and this could be made to appear to the satisfaction of a court of equity, they would have little trouble in this cause to have a rescission of the contract, but they seem neither to desire a rescission nor to perform their part of the contract by making the notes, or paying anything on account of the purchase-money. As to the liens upon the lands constituting a part of the objections of defendants to the deed tendered them by plaintiff, and which plaintiff testifies do not amount in all to more than from $15,000 to $20,000, the defendants have a right to compel the application of the purchase-money due from them to the payment of such liens and have credit therefor upon the purchase money. *Douglass* v. *Rutherford*, 25 W. Va. 708; *Curry* v. *Hale*, 15 W. Va. 867.

It appears from the affidavits filed that all the timber has already been removed by appellants from some of the tracts and a large portion from others, and that the timber constitutes the chief value of the land and that when the

timber is removed from the land a large part of it would be almost worthless. Affiants stating that the property was constantly being depreciated in value. Many affiants state that in their opinion the whole property would not sell for $300,000. There is some evidence tending to prove the insolvency of the appellants, defendants in their answer make a general denial of the allegation of insolvency but it is not made to appear affirmatively that they have assets to any considerable amount other than that purchased from plaintiff, while indebtedness is shown, besides the $300,000 of purchase money to plaintiff, of at least $19,500; that on contracts for services for which cash was to be paid the parties who were entitled to cash were put off for a long time with the notes of appellants who said they could not pay cash.

There is much evidence in the affidavits filed in the case of the mismanagement of the business and want of experience therein, not only general statements of the fact, but giving specific acts of mismanagement resulting in waste. Defendants rely principally to overcome the effect of these affidavits upon their denial in the answer to the allegations of plaintiff's bill touching the bad management of the business and the incompetency of the managers. The answer is not taken as proof even when sworn to, the general replication to the answer puts the defendants on proof of the allegations thereof.—*Knight v. Nease*, 53 W. Va. 50; Code, chapter 125, section 38. Defendants claim "that they have placed on the said land and railroad in the shape of permanent improvements about Seventy Thousand Dollars." They extended the railroad some 3 or 3½ miles at a cost, as they claim, of about $31,000, as a part of such "permanent improvements." Alex. W. Ewing, a civil engineer, who assisted as such engineer in the construction of the 13 or 14 miles of said railroad constructed by plaintiff at a cost (as claimed) of $74,000, states that the same was all or principally over mountains and hills, through mountain gorges, along side hills, which were, many of them, very steep, and altogether a very rough route over which to construct a railroad; that on the other hand the part of the road constructed by Butts, McCormick and Wilson was through bottom lands and over an easy and cheap route of construction, and states that he

"believes the cost of constructing the road bed made by said Spies is as per mile four times as great as that per mile as that constructed by Butts, McCormick and Wilson."

If this statement be true the outlay of defendants for the construction of the extension of the railroad of 3 or 3½ miles was at an unnecessarily extravagant cost. Appellants' counsel further say, "Abatements are now due from the plaintiff to the defendants to a larger amount than unpaid purchase-money;" the words "now due" in said statement meaning as of the date of the decree. The contract contains the following provision: "It is understood and agreed, however, that if the said party of the first part shall be unable by the said first day of July, 1904, or at the time of the delivery of the deed hereinbefore mentioned, to make good title to any of the tracts of land, coal and standing timber, intending to be conveyed by this agreement, the same may be conveyed by him to the parties of the second part at any time before final settlement shall be made of the purchase price aforesaid, upon the perfecting of his title thereto, and no abatement shall be made of said purchase price by reason of any such tracts so conveyed before such final settlements." Abatements under this provision of the contract are matter for future adjudication. Appellants cite *Wilson* v. *Maddox*, 46 W. Va. 641, where it is held in Syllabus, pt. 3: "When the equities of the bill are fully and fairly denied by answer, unless the plaintiff overcome such denial by other testimony, the question should no longer be regarded as one addressed to the discretion of the court, but it is error to appoint a receiver when the charges of the bill are so denied." And also cite *Ruffner* v. *Mairs*, 33 W. Va. 655; High on Receivers, Par. 24; and 1 Bart. Chy. Prac., section 146, as conclusive against the appointment of the receiver in this case, defendants having answered denying the allegations of the bill. Said section 146, Bart. Chy. Prac. says: "The evidence necessary to overcome the effect of an answer may be introduced by affidavits, which may be filed both before and after the answer comes in; and it is enough that the plaintiff by his bill and affidavits makes out a *prima facie* case, for the court in passing upon the application in no manner anticipates the ultimate judgment upon the rights of the parties on the

merits of the case; indeed, so little does the court consider the merits of the case, that on such an application (for a receiver) it will not even regard an objection that the bill is multifarious, or that it is faulty for misjoinder of parties." —Citing High on Receivers, sections 84, 85, 86, 88, 89 and 738. And it is there further said: "The evidence introduced when the application is before decree must be in support of the allegations of the bill, and the answer of the defendant is to be regarded merely as his affidavit."

As a further reason for the appointment of a receiver the plaintiff makes the following allegation: "That the defendants, James McCormick, Ida M. Butts and Harry T. Wilson, have refused to pay taxes for the year 1904, on the real estate conveyed to them by the plaintiff, and some of the same has been returned delinquent, and unless redeemed, the same will be sold by the State for the non-payment thereof." In order to prevent the returning of some of the said land delinquent, the plaintiff has been compelled to pay a part of the taxes thereon, and the defendants, James McCormick, Ida M. Butts and Harry T. Wilson, refuse to refund the amount so paid by him." This allegation seems to have been ignored by the defendants both in their answer and in their briefs of counsel, except a general denial in the answer where they "deny each and all the allegations of said bill not herein specifically admitted to be true, and call for full proof thereof." In *Darusmont* v. *Patton*, 4 Lea (Tenn.) 597: "It is a good ground for the appointment of a receiver of land in a suit pending in this court, where the decree below declares the applicant to have a lien on the land for the payment of debt, that there are taxes due and unpaid which are about to be enforced by a sale of the land, unless the party in possession will pay the taxes in a reasonable time." See note to *Cameron* v. *Improvement Company*, (20 Wash. 169) 72 Am. St. Rep. at page 95: "As between the parties the one in possession—whether vendor or vendee—is liable (for taxes), unless it is otherwise stipulated, and, if the one not in possession is compelled to pay them, he has a remedy over against the other. A vendor who has thus been forced to pay taxes may withhold conveyance until reimbursed."—28 A. E. E. L. (1st ed.) 125; *Hill* v. *Denckla*, 28 Ark.

506. In *Creigh* v *Boggs*, 19 W. Va. 240, (Syl. pt. 5,) it is held: "Where a written contract for land has been made, and the vendee dies, and the vendor of the land is compelled to pay taxes incurred after the death of the vendee to prevent the sheriff selling it for delinquent taxes, the heirs and not the administrator of the vendee are bound to refund to the vendor the taxes so paid; and he is not bound to deliver them a deed for the land, till they have done so, though the administrator may have paid him the whole of the purchase-money." In *Farber* v. *Purdy*, 69 Mo. 601, it is held: "A vendee of real estate in possession under a contract of sale is liable, as between himself and the vendor, for all taxes assessed after the commencement of his possession, and the fact that by the contract the vendor is bound to make him a warranty deed upon payment of the purchase money, does not change this rule."

When the plaintiff sold these lands to the defendants, in his contract of sale it was provided; "As a further security for the payment of said sum of $300,000.00 a vendor's lien shall be retained by the party of the first part upon all the real estate above described, and a deed of trust shall be executed by the said Pickens and Hackers Valley Railroad Company upon all and singular its real estate, rights of way, rolling stock, equipment, rights and franchises to secure the payment of the same, the execution of which said deed of trust shall be contemporaneous with the transfer to the parties of the second part of the capital stock of said corporation." And in a suit to enforce his rights against the real estate under his contract, if it appear that the property is being wasted or depreciating in value the court should appoint a receiver. The vendor had a right to look to the land and its timber for security and if the property is in danger of loss or misappropriation he is entitled to the aid of a court of equity to protect his interest by taking charge and preserving the property. In *Core* v. *Bell*, 20 W. Va. 169, (Syl. pt. 1,) it is held: "An injunction to stay waste ought to be granted a vendor against a vendee, to whom he has sold a tract of land in fee simple retaining the title as a security for the purchase-money, who brings his suit to subject the land to the payment of the purchase-money, and the bill charges the defendant with cutting timber on the land

in a manner calculated to render it an incompetent security for the payment of the purchase-money. In such a bill it is not necessary to allege the insolvency of the defendant." At page 174, in the last mentioned case it is said in the opinion: "In a bill for such a purpose it is not necessary to allege the insolvency of the defendant. The vendor has retained the title as security for the purchase money and he has a right to look to the land for payment thereof, and is not under any circumstances during the life of the vendor compelled to look elsewhere for payment." In *Ogden* v. *Chalfant*, 32 W.Va. 559, (Syl. pt. 2,) it is held: "A receiver may be appointed in such case whenever it is shown in any proper manner that the debtor is insolvent, or that the lands are likely to prove insufficient to satisfy the undisputed or ascertained liens thereon."

It is contended by counsel for appellants that plaintiff had no lien on the timber after it was severed, that while standing it was realty and the moment it was severed it became personalty and the absolute property of the vendees. Plaintiff had no occasion up to this time for his vendor's lien upon the land as he had sold it by an executory contract and had withheld the legal title to the whole property as security for the purchase-money until by the completion of the contract by the making of the notes of $5,000 each to be paid monthly by the defendants and the execution by plaintiff of a deed for the property, his vendor's lien would be effective. It is true he had no vendor's lien upon the timber either before or after it was severed, for such lien was not yet acquired, but he held the legal title as his security. 2 Jones on Liens, section 1107, says:

"A LIEN BY CONTRACT IS NOT A VENDOR'S LIEN. The interest of a vendor who has given an ordinary contract or bond for the sale of land, but retains the title to the land in himself, is often spoken of in the cases as a vendor's lien; but it is conceived that this is a misuse of terms, which should be avoided as leading to confusion. There is fundamental distinction between a vendor's security in such case and the lien implied by law, and properly known as the vendor's lien. When the legal title remains in the vendor, the vendee has merely an equity of redemption in the land, and no act of his can possibly affect the vendor's

title; while, in case of a mere lien in the vendor, the fee is in the purchaser, who may at any time discharge the lien by conveying the land to a *bona fide* purchaser for value. In the one case the vendor has a lien without any title, and in the other he has the title without any occasion for a lien. His title, by the terms of the contract, is his security; and he cannot in any way be divested of his title, except the vendee fulfills his contract, and by that means becomes entitled to a conveyance." In treating of liens arising from express contracts, section 1235, in his 3rd volume, Mr. Pomeroy says: "The doctrine may be stated in its most general form, that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or encumbrancers with notice. Under like circumstances, a merely verbal agreement may create a similar lien upon personal property."—And cases there cited.

Plaintiff and defendants had entered into this contract of January 28, 1904, intending that the whole property should remain as security for the purchase-money of the realty and it appears from the contract itself that the cash payment was to pay for the personal property purchased and for such timber as might be cut and removed within the first few months and until the contract might be completed by the execution of the deed on the part of the plaintiff and the making of the 59 $5,000 notes for the residue of the purchase-money. The defendants elected to take possession under the contract and continue to cut and remove the timber while refusing to accept the deed tendered them. While they had entered lawfully into possession they were cutting and removing the timber in violation of the contract, from the time they refused to make the notes required by the contract. A part of the timber cut and manufactured has not been removed from the premises to which the plaintiff still has the title, and it is

shown that the defendants are removing the timber and refusing to make the notes as required by the contract, or to apply any of the proceeds of their product from the land to the payment of the purchase-money due from them to the plaintiff. "A vendee in possession must do nothing to diminish the security of his vendor, either by committing waste or removing annexations of a permanent character."—28 A. & E. E. L. 122 (1st ed.). If defendants contention is correct, they could, if they chose, sever all the timber on the land and convert it into personal property of which they would be the absolute owners and so deprive the plaintiff of his lien or right to look to the timber so severed for his purchase-money, and they could transfer their interest, or good title, in or to the same to an innocent purchaser without notice of their fraud, thus depriving the plaintiff of any remedy as against the timber. In section 1260, 3 Pom. Eq. Juris., it is said: "There is a plain distinction between the lien of the grantor after a conveyance, and the interest of the vendor before conveyance. The former is not a legal estate, but a mere equitable charge on the land; it is not even, in strictness, an equitable lien until declared and established by judicial decree. In the latter, although possession may have been delivered to the vendee, and although under the doctrine of conversion the vendee may have acquired an equitable estate, yet the vendor retains the *legal title*, and the vendee cannot prejudice that legal title, or do anything by which it shall be divested, except by performing the very obligation on his part which the retention of such title was intended to secure—namely, by paying the price according to the terms of the contract." The defendants have remained in possession of the land after their contract required them to give the 59 notes of $5,000 each for the deferred payments of purchase-money, cutting and removing the timber therefrom, refusing to pay anything on the purchase-money and refusing to make said notes as required by the contract, and equity will give the vendor a right to hold the manufactured product remaining on the premises liable to the purchase-money past due to him.

Appellants say the court erred in fixing the penalty of bond to be given to them on their motion in order to set aside so much of the decree as appointed a receiver and re-

fused to dissolve the injunction, claiming that a penalty of $150,000, required by the court, was excessive. There is nothing offered in the petition or briefs of appellants to sustain this assignment of error except the assertion that it is exorbitant and excessive. We see nothing in the record to satisfy this Court of their contention, or that would warrant the appellate court in holding that the court erred in this regard.

For the reasons herein given the Court is of opinion there is no error in the decree of the circuit court and the same is affirmed and the cause remanded to the circuit court of Upshur county for further proceedings to be had therein according to the rules governing courts of equity.

Affirmed.

CHARLESTON

GENTRY *v.* POTEET *et al.*

Submitted February 16, 1906. Decided April 10, 1906.

1. ESTOPPEL—WHAT CONSTITUTES—*Agreed Statement of facts.*

   Where an action of ejectment is brought and submitted upon an agreed statement of facts, and before the decision thereof the defendants move to withdraw such agreed statement of facts, and file a bill in equity setting up a matter of equity not cognizable in such action, and praying for an injunction restraining the prosecution of the action of ejectment, such agreed statement of facts will not estop them from setting up such equity and enjoining the prosecution of such action. (p. 412.)

2. TRUSTS—*Evidence.*

   Where land is purchased and paid for by one who takes a title bond therefor and who dies before obtaining a deed, leaving surviving him a widow and children, and the widow, on account of such purchase, procures the vendor of her husband to convey the land to her, she will be treated in equity as a trustee, holding the legal title for the heirs, the equitable title thereto having, immediately upon the death of the father, vested in them, subject to the widow's dower. (p 416)

3. SAME—*Express Trust—Establishment.*

   A verbal statement of one holding the equitable title to land to

the effect that he wants the same conveyed to his wife will not operate to pass the equitable title to her, and where, after the death of the husband, his vendor, on account of such statement, conveys the land to the widow, such deed does not thereby vest the equitable title to said land in the widow, but it will operate only to convey the legal title, to be held by her in trust for the heirs, which a court of equity will enforce, upon proper bill filed for that purpose. (p. 416.)

4. EQUITY—*Laches.*

The plaintiffs and those under whom they claim are not guilty of *laches* in asserting their rights. (p. 416.)

Appeal from Circuit Court, Fayette County.

Action by T. J. and C. D. Gentry against W. C. Poteet and Isabella Blake. Judgment for complainants, and defendant Poteet appeals.

Affirmed.

R. T. HUBARD, JR., and DILLON & NUCKOLLS, for appellant.

PAYNE & HAMILTON, for appellees.

SANDERS, JUDGE:

Dickinson Blake, in 1872, purchased of A. B. Duncan two adjacent tracts of land in Fayette county, containing sixty and fifty-one acres, respectively, taking a title bond therefor. He paid the purchase money, entered into possession of the land, and resided thereon until his death, in 1877, but never obtained a deed. Blake left surviving him his widow, Isabella Blake, and four infant children, and another child was born about six months after his death. In December, 1879, Duncan conveyed the land so purchased by Blake from him to "Isabella Blake, widow of Dickinson Blake, and the heirs of her body by said Dickinson Blake, deceased." By conveyances from two of the heirs of Dickinson Blake, a two-fifths undivided interest in this land passed to and was vested in C. T. and G. W. Jones, and by conveyance Ella D. Blake, one of the heirs, became the owner of an undivided one-fifth interest in the surface. She retained the interest which descended to her, as did also Robert Blake, another of the heirs, and on the 18th day of October, 1899, C. T. and G. W. Jones and Robert and Ella D. Blake entered into an agree-

ment of partition, by which there was allotted to the two latter parties forty-one acres of the surface of said land.

On the 7th day of January, 1902, Robert and Ella D. Blake conveyed to T. J. and C. D. Gentry five acres of the surface of the land so acquired by them. This land was, in the year 1900, sold by the Blakes to Jerry Fitzpatrick, who made him a deed therefor, which, however, he failed to record. The Gentrys purchased from Fitzpatrick, and at the time of the purchase the deed to him was destroyed, and a deed taken as before stated. On the 27th day of February, 1904, the Gentrys procured a deed to the property from Fitzpatrick, and placed same upon record, thereby becoming vested with the title of the heirs of Dickinson Blake to the property.

On July 20, 1903, Isabella Blake conveyed to W. C. Poteet five acres of surface land. This is the same land which T. J. and C. D. Gentry acquired by their purchase, and subsequent deed, from Fitzpatrick.

In this condition of affairs, Poteet claiming under his deed from Isabella Blake, and the Gentrys claiming under the heirs of Dickinson Blake, W. C. Poteet brought, in August, 1903, in the circuit court of Fayette county, an action of ejectment against the appellees, T. J. and C. D. Gentry, to recover the tract of five acres, and on the 23rd day of February, 1904, the first day of the February term of the circuit court, the parties to the action of ejectment, by their attorneys, entered into an agreement by which it was provided that the action should be submitted for determination to the court, in lieu of a jury. The agreement stipulated that the defendants in the action claimed title to only five-sixths of the land in controversy, and disclaimed as to one-sixth; that the title to said land had been regularly derived from the Commonwealth, and that both parties claimed title under the conveyance from A. B. Duncan to Isabella Blake; that the only question to be determined was the legal construction of said deed—if the court should hold that it vested the fee simple title to the whole of the land in Isabella Blake, the judgment should be for the plaintiff; and if it should be held that it conveyed a joint estate to Isabella Blake and her children, then judgment should be for the defendants, except as to the one-sixth interest which they disclaimed.

Upon the agreement the case was argued and submitted for decision on February 24. On the morning of February 26, the defendants asked leave of the court to withdraw the agreement, on the ground of after discovered equities, and in support of their motion filed the affidavits of A. B. Duncan, C. D. Gentry and W. D. Payne. The record does not show that this motion was acted upon. On the 4th day of March, following, the defendants applied for and obtained an order restraining the plaintiff from using as evidence in the action of ejectment the deed made to him by Isabella Blake, and from further prosecuting the action until the further order of the court. In the bill filed, upon which this order was issued, it is alleged that the conveyance to Isabella Blake by Duncan vested in her only the legal title to the estate, and that the conveyance from her to Poteet was not upon valuable consideration, but was made for the purpose of enabling him to extort money from the plaintiffs in the bill. Poteet and Isabella Blake answered, controverting the construction placed upon the deed from Duncan to Mrs. Blake, and alleging that the transaction between them was *bona fide*.

On the final hearing, the court enjoined W. C. Poteet from using in the action of ejectment the deed from Isabella Blake to him, directed a conveyance by Poteet to the Gentrys of the five acres of land, and in default of his making the conveyance, appointed a commissioner to do so, but reserved the question as to whether or not Mrs. Blake had waived her right of dower, for further determination. From this decree W. C. Poteet has appealed.

The appellant contends that the demurrer to the bill should have been sustained. The first criticism of the bill is that it alleges that the plaintiffs are both the legal and equitable owners of the land, and if this be so, they had an adequate and complete remedy at law, by defending the action of ejectment. While it is true the plaintiffs in their bill allege they are informed and believe that they own both the legal and equitable title to the land, yet when the bill is construed in all its parts, it clearly appears that the defendants have only the equitable title, and that the legal title is held by Isabella Blake in trust for them. And it is urged that if the allegation of the bill is not true, and the plaintiffs do not have the legal title, they are not in a position to maintain a suit to re-

move a cloud, but, in order to maintain such suit, they should have the legal title, and actual possession. This is unquestionably true, and has been decided by this Court repeatedly. But counsel for appellant seem to entirely misconceive the purpose and scope of the bill. Its object is not to remove a cloud from the title, but to enforce a trust, The gravamen of the bill is that Dickinson Blake purchased and paid for the land, in his life time, taking a title bond therefor, but died without having obtained a deed, and that after his death his vendor, Duncan, on account of such purchase, conveyed the land to Isabella Blake, his widow, and that this being so, she holds the naked legal title as trustee for the heirs of Dickinson Blake, which a court of equity will declare, and enforce in their favor. This matter could only be set up in a court of equity, and the demurrer to the bill was properly overruled.

Complaint is made that the court erred in not dismissing the bill on the ground that the plaintiffs are estopped from setting up any matter inconsistent with their solemn agreement in the ejectment suit. It is unnecessary to determine whether this agreement was withdrawn, or whether the defendants, in that action, had the right to do so. It was made in the action of ejectment, for the trial and disposition of that case. The matter of equity set up in the bill was not cognizable in such action, and the plaintiffs could not have set such matters up as a defense. The agreement is not materially inconsistent with the matters set up in the bill. Its material parts are that the title under which both plaintiff and defendants claim was regularly derived from the Commonwealth of Virginia; that both claim under the deed from Duncan to Isabella Blake, and that the only question in dispute and to be adjudicated was the legal construction to be placed upon the deed from Duncan to Isabella Blake, and that if the court in construing it should hold that the deed passed a fee simple title to the widow, then judgment should be given for the plaintiff, but on the other hand, if it should be so construed as to pass a joint estate to Isabella Blake and her children, then judgment should be given for the defendants. By this agreement the controversy was so reduced as to invoke the judgment of the court upon the construction of the deed only. In other words, the true scope of this agreement was to place

the title papers before the court for construction and decision as to who had the legal title to the land. This did not and could not in any sense affect the equitable title of the defendants. The court was only called upon to pass on the question as to who had the legal title to the property. Not being able to set up such equitable defense in the action of ejectment, the fact that the appellees entered into an agreement whereby the judgment of the court was invoked upon the construction of certain title papers cannot destroy their right to resort to a court of equity to enforce the trust and require the conveyance of the legal title to them. None of the material facts of the agreement are controverted by the bill, but by it are practically admitted. The bill, however, goes further and shows that although the deed, upon its face, appears to pass a fee simple estate to Isabella Blake, yet, as Dickinson Blake, in his life time, acquired the equitable title to the land, and did not obtain a deed, the equitable title, subject to the widow's dower, immediately upon his death descended to and vested in his children, A. B. Duncan, his vendor, holding the legal title in trust for them, and he so holding the legal title, and having conveyed the same to Isabella Blake, she took nothing by the conveyance except the naked legal title as trustee for the heirs, which in equity she will be compelled to convey to them.

The appellant claims that under the deed from him to Isabella Blake, both the legal and equitable title passed to and vested in him. We deem it unnecessary to review the authorities to show that the deed from Duncan to Isabella Blake had the effect of passing to her a fee simple estate in the land. The words in the deed create an estate in fee-tail special, under the statute *de donis conditionalibus*. 1 Tucker's Comm., part 2 page 45; Bl. Comm., vol. 1, book 2, pages 111-114, which by our statute is converted into an estate in fee simple. Section 9, chapter 71, Code: "Every estate in lands so limited that, as the law was on the seventh day of October, in the year, one thousand, seven hundred and seventy-six, in the state of Virginia, such estate would have been an estate tail, shall be deemed an estate in fee simple; and every limitation upon such an estate shall be held valid, if the same would be valid when limited upon an estate in fee simple created by technical language." While this deed passed the

legal title to the land to Isabella Blake, and upon its face appears to have passed to her a fee simple estate, yet if her vendor only held the legal title in trust for the heirs of Dickinson Blake, it could only have the legal effect of passing to her such title as he held. The facts conclusively show that Dickinson Blake, in his life time, purchased and paid for the land, taking a title bond therefor, and that after his death, on account of such purchase, Duncan conveyed the same to the widow, Isabella Blake. If this were all, there could be no question but what the equitable title, immediately upon the death of the father, passed to and vested in the children, and the widow, having taken the deed to the land, a court of equity will declare her a trustee for the children, holding the legal title, and will compel her to convey the same to them, or their vendees. But it is asserted that Dickinson Blake, before his death, authorized and directed a conveyance of this land to his wife, and that thereby the equitable title immediately became vested in her. There is no claim, however, that Blake personally directed his vendor, Duncan, to convey the land to the wife, and what he did say upon this subject is difficult indeed to determine. The evidence is vague, indefinite and uncertain. Mrs. Blake, in her testimony, says that her husband, in his last sickness, had a conversation with her, his father, Adam Blake, and his brother, James Blake, in which he told them that he wanted the property deeded to her. J. R. Huddleston testifies that Blake, during his last sickness, told him and his father, Adam Blake, that he wanted his father to go to Duncan and get a deed to his wife as long as she remained his widow. L. J. Smith testifies that Blake, before his death, said that he wanted one Mahoney to take charge of and manage his property—that his wife had no business ability. Viewing it, however, in the strongest light for the defendant, and assuming that Dickinson Blake made the statement which he is claimed by his widow to have made, it would not be such a promise or contract as could be enforced, even in his life time. To do so would be in violation of the Statute of Frauds, and it not being capable of enforcement, it is difficult to see how the equitable title, by reason of such statements, could vest in the widow. The most that can be claimed is that it was a gift to the wife, which remained wholly unexecuted, and which was revocable at the

pleasure of the donor, and it not having been executed by Blake in his life time, and not being such promise as could be enforced by the widow, the equitable title, immediately upon his death, vested in his heirs. The case of *Coleman* v. *Cocke*, 6 Rand. 618, is cited as authority to sustain the position that upon the request of the husband to convey the land to the wife, the equitable title thereby immediately was transferred to and vested in her. There, the father, who had purchased the land and held the equitable title, directed the vendor to convey the same to his son, which was done in the life time of the father, and the son conveyed a part of the same to a brother, and the brother conveyed a part of the land which was conveyed to him to another, for a valuable consideration, and the question arose between a creditor of the father, and the purchaser for a valuable consideration, as to who had the prior equity, and the court held that the equity of the purchaser was paramount, and in dealing with the question, said: "The equitable title of the father was not transferred to the son by the execution of the deeds to him by the Cockes, but by the previous authority given by him to them to execute those deeds. And if such an authority had been given by the letter, and the deeds never made, a *bona fide* purchaser of the equitable interest from Wm. A. Bentley would have had a better right now to call upon the Cockes for their conveyance of the legal title, than any creditor of Wm. Bentley getting a judgment against him after the transfer of his equitable right to his son. Such a transfer was valid without deed, and was not necessary to be recorded to make it available against his creditors." In what way this transfer by the father to the son was made, does not clearly appear, but we observe from the quotation above that it is said, "if such authority had been given by the *letter*, and the deeds never made, a *bona fide* purchaser of the equitable interest from Wm. A. Bentley would have had a better right," etc. And then, again, it is said that such a transfer was valid without deed, and was not necessary to be recorded, to make it available against creditors. Therefore, from these statements of the opinion, it would seem that there had been a written request by the father to his vendor to convey to the son.

Again, in that case, the gift by the father to the son had

been fully consummated by the vendor carrying into effect the direction given by the father. This being so, it had the effect of passing both the legal and equitable title to the son, whether the equitable title had been previously transferred to the son by the father or not. Where the gift or direction is not executed, then it is not susceptible of enforcement unless it be such as to transfer the equitable title, and the test as to whether or not the equitable title was transferred by the promise here, is whether or not Isabella Blake would have had the right to have enforced such promise. If she could not have specifically enforced it, then it could not have the effect of transferring to her the equitable title. Did she have such right? This was a verbal promise, without valuable consideration, and to have enforced it would have been in direct violation of the Statute of Frauds, and would also mean nothing more nor less than that one can, by verbal direction, control the disposition of his property after death. If the gift or promise had been carried into effect by Duncan, in the life time of the husband, conveying the land to the wife, then the conveyance would have had the effect of passing both the legal and equitable title to her. While the promise, it is true, was verbal, and not such as could be enforced by the wife, yet if the land had been conveyed by direction of the husband, he would be estopped to deny that he had given such direction.

It is true that Duncan, after the death of Blake, upon her request conveyed the land to the widow, but the conveyance not having been made in the life time of Dickinson Blake, and the promise or gift not being such as could be enforced, and not having passed to Isabella Blake the equitable title to the land, immediately upon the death of Dickinson Blake the legal title passed to and vested in his heirs, and this being so, the conveyance by Duncan to Isabella Blake only operated to convey to her the legal title, which was held by him as trustee, and being so held by him, would upon a conveyance to her be likewise held in trust by her for the heirs.

It is charged that the plaintiffs, and those under whom they claim, are guilty of *laches*, and for this reason they should be denied relief. Upon what claim this assignment is predicated, we do not know. No reasons are given by counsel to support it, and there is nothing appearing in the record to

vindicate this position. As we have observed, the widow held only the legal title to the land, in trust for the heirs. She, together with her children, lived upon the land until it was sold to Fitzpatrick, and ever since then it has been in possession of Fitzpatrick and the plaintiffs claiming under him. It is difficult to arrive at any other conclusion from the testimony of Isabella Blake alone but that she has all along since her husband's death, recognized the equitable title as being in the heirs. At the time of the father's death, the oldest child was only eight years old, the youngest being born about six months thereafter. And at the time they became of age, or shortly thereafter, they began to dispose of their respective interests in this land, which apparently met with the approval of their mother. Nothing to the contrary was asserted, and just in what way the delay in bringing this suit to extract the legal title and vest it in the heirs, could affect her, is difficult to determine. Then, again, W. C. Poteet, claiming under her, is in no position to complain. He is not a purchaser without notice and for a valuable consideration. And not only this, but he married one of the heirs of Dickinson Blake about twenty years ago, lived with the family a great deal of the time, and from his testimony we must conclude that he was perfectly familiar with the title, and with all the facts and circumstances surrounding it. He knew the heirs and those holding under them were claiming the land, at the time he took his deed. In fact, he joined with his wife, one of the heirs, in conveying all her right, title and interest in this land, thereby recognizing her interest therein. Also, at the time he took his conveyance, this land had been conveyed by the heirs, and the deeds of conveyance had been put upon record.

Complaint is made that the court, upon the final hearing, read the *ex parte* affidavits of A. B. Duncan, C. D. Gentry and W. D. Payne. Whether or not this was error it is entirely unnecessary to determine, because, upon the whole case, it is perfectly clear that the decree was proper. Exclude the affidavits, and the result would have been the same. Therefore, if it was error to read them, it was certainly not prejudicial to the defendants.

Upon the whole case, the decree is right, and is affirmed.

Affirmed.

CHARLESTON

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WOODS *v.* KING *et al.*

Submitted September 15, 1905. Decided April 17, 1906.

1. ERROR—*Bill of Exceptions—Evidence—Record.*
A bill of exceptions, relied on to make the evidence a part of the record in an action at law, must incorporate, or have annexed to it, the evidence, or contain a sufficient description or other means of identification of such evidence. Otherwise the bill is insufficient to make the evidence a part of it or of the record. (p. 418.)

(BRANNON, JUDGE, absent).

Error to Circuit Court, Randolph County.

Action by Samuel Woods against Susan G. Elder and others. Judgment for plaintiff. Defendants bring error.

Affirmed.

J. F. STRADER, MARBURY & GOSNELL, and W. E. CHILTON, for plaintiff in error.

C. W. DAILEY and W. B. MAXWELL, for defendants in error.

COX, JUDGE:

Susan G. Elder, Sophy Stonnard and William Voss complain of a judgment rendered against them by the circuit court of Randolph county in an action of ejectment instituted by Samuel Woods.

All the assignments of error involve a consideration of the evidence introduced upon the trial in the court below. The bill of exceptions relied on to make the evidence a part of the record is a skeleton bill, designated as No. 1. The original bill was brought here by writ of *certiorari*. The parenthetical direction to the clerk therein contained is as follows: "(Here insert all the oral and written testimony introduced.)" The evidence directed to be inserted was not incorporated in or annexed to the bill. The bill furnishes no description of, or means of identifying, the evidence directed to be therein inserted, other than the parenthetical direction above quoted and the parenthetical direction furnishes no means of identifying the evidence. The bill is therefore insufficient to make the evidence a part of it, or a part of the

record. For this reason we can not pass upon the assignments of error involving a consideration of the evidence, but must affirm the judgment. The principles upon which this decision rests have been so often stated that it is unnecessary to repeat them. See *McKendree* v. *Shelton*, 51 W. Va. 516; *Tracy's adm'x* v. *Carver Coal Co.*, 57 W. Va. 587; *Dudley* v. *Barrett*, 58 W. Va. 235, (52 S. E. 100); *Railway Co.* v. *Joyce*, 58 W. Va. 544, (52 S. E. ——); *Parr* v. *Currence*, 58 W. Va. 523, (52 S. E. 496).

After the writ of error was allowed in this action, certain affidavits and a certificate of the clerk of the lower court, relating to the time of transcribing the evidence and to the usual practice in that court as to skeleton bills of exceptions and other matters were filed in the lower court and brought here with the return to the writ of *certiorari*. These do not aid us upon the question presented. The record imports verity and must stand or fall without the assistance of the affidavits and certificate. *Sweeney* v. *Baker*, 13 W. Va. 202; *Koontz* v. *Koontz*, 47 W. Va. 31; *Bowyer* v. *Chestnut*, 4 Leigh (Va.) 1. If the affidavits and certificate could be considered they contain no sufficient matter to change this decision.

We affirm the judgment.

Affirmed.

CHARLESTON

HANLEY, ADMR., *v.* W. VA. C. & P. RY. CO.

Submitted February 27, 1906. Decided April 17, 1906.

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1. DEATH—*Action for Damages—Pleading—Admissions.*

In an action under sections 5 and 6 of chapter 103, Code (1899), for damages for the death of a person caused by wrongful act, neglect or default, a plea to the merits of the action admits the representative character in which the plaintiff sues. (p. 421.)

2. PLEADING AND PROOF—*Variance.*

In such action, a variance between the declaration and the proof, relating alone to the instrument by which a bodily injury was in-

flicted, is immaterial and should be disregarded, when the instrument alleged and the instrument proved are of the same general nature. (p. 423.)

3. DEPOSITIONS—*Seal of Notary.*
A deposition of a witness who resides out of this State, taken out of this State in conformity with section 33, chapter 130, Code (1899), in an action at law pending before a circuit court of this State, may be received, when properly certified under the hand of the notary public before whom it was taken, although not under his official seal, if otherwise proper. (p. 429.)

4. SAME—*Witness Out of State.*
A deposition of a witness taken out of this State, in an action at law pending in a circuit court of this State, may be read upon the trial of such action, if the deposition shows that the witness resided out of this State when it was taken and if otherwise proper, unless it appears that the witness is in this State when the deposition is offered. (p. 429.)

5. DEATH—*Negligence—Burden of Proof—Presumptions.*
This action being founded upon negligence, the burden of proof is upon the plaintiff to show that the defendant has been negligent. Negligence will not be presumed alone from the explosion of a locomotive boiler, in use in lawful business upon the tracks of the defendant. (p. 430.)

6. TRIAL—*Evidence—Motion to Exclude.*
Upon the consideration of a motion to exclude all of the plaintiff's evidence introduced upon the trial of an action, he is entitled to the benefit of all proper evidence so introduced, and to all legitimate inferences of fact which may be drawn therefrom. (p. 430.)

7. EVIDENCE—*Expert Testimony.*
An expert witness may give an opinion, in a proper case, based upon his own knowledge of facts disclosed in his testimony; or he may give an opinion upon the facts shown in evidence, and assumed in a hypothetical question submitted to him. (p. 430.)

8. APPEAL—*Review—Reversal.*
Where the circuit court on motion excluded all of the plaintiff's evidence, directed a verdict for defendant and dismissed the action, and upon writ of error to the judgment it appears that material and proper evidence offered by plaintiff during the progress of the trial was improperly rejected to the plaintiff's prejudice, this Court will reverse the judgment, set aside the verdict, award a new trial, and remand the case. (p. 431.)

Error to Circuit Court, Randolph County.

Action by James Hanley, administrator, against the West

Virginia Central and Pittsburg Railway Company. Judgment for defendant, and plaintiff brings error.

Reversed. Remanded.

W. B. MAXWELL and C. H. SCOTT, for plaintiff in error.

C. W. DAILEY, for defendant in error.

COX, JUDGE:

This action of trespass on the case was instituted by James Hanley, administrator of Mrs. Catherine N. Rabbett, against the West Virginia Central and Pittsburg Railway Company, in the circuit court of Randolph county. The plaintiff avers that he is entitled to recover $10,000 damages for the death of Mrs. Rabbett, caused by the explosion of the boiler of a railroad locomotive in use by the defendant upon its tracks in the city of Elkins; and that by the explosion the boiler was rent asunder, and a large piece of the metal thereof hurled upon the residence of Mrs. Rabbett, crashing through it and striking her, inflicting severe and fatal injuries, from which she died. Plaintiff also avers that the explosion was produced by the defective and unsafe condition of the boiler, and by mismanagement by the servants of the defendant. Upon trial before a jury, a motion to exclude all of the plaintiff's evidence and to direct a verdict for defendant was sustained, and the action dismissed. Upon petition of plaintiff, a writ of error was allowed to the judgment.

Defendant contends that plaintiff is barred of a recovery, regardless of his assignments of error, because he offered no evidence to show his due appointment and qualification as administrator. The authority for an action of this kind is found in sections 5 and 6, chapter 103, Code, which in part provide: "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof; then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter.

"Every such action shall be brought by and in the name of the personal representative of such deceased person," etc.

The plea entered in this action was not guilty. There was no plea of *ne unques administrator*. The question is: Does the plea to the merits admit the representative character in which the plaintiff sues? Some of the early cases and authorities hold that, where an administrator or executor sues upon a cause of action arising in his own time and not in the time of the decedent, a plea to the merits does not admit the representative character in which the plaintiff sues; and that the plaintiff, notwithstanding such plea, must make proof of such character. 2 Lomax Executors 612–613; 2 Greenleaf Ev. section 338. This early doctrine seems never to have had the assent of all the early cases. See *Watson* v. *King*, 4 Campb. 272, and *Loyd* v. *Finlayson*, 2 Esp. 564. It seems that necessity for proof of the representative character was never required after a plea to the merits, except where the cause of action arose in the time of the representative, and the representative might maintain the action in his own name without designating his representative character. *Denver etc. Ry. Co.* v. *Woodward*, 4 Col. 1. The tendency of the latest and best considered cases in America is to make no distinction between cases upon causes of action arising in the time of the decedent, and cases upon causes of action arising in the time of the representative, and to hold in all cases that a plea to the merits admits the representative character in which the plaintiff sues. 18 Cyc. 994–6, notes 64 and 65. Whether this be the correct view or not, our case of *McDonald* v. *Cole*, 46 W. Va. 186, lays down the rule, without limitation or qualification, that "where one sues as executor or administrator, or in other representative character, there need be no proof of his appointment or authority unless a plea denies it. A plea to the merits admits the right of the plaintiff to sue as he does." It is true, that case was upon a cause of action arising in the time of the decedent, but the rule mentioned seems to have been announced as general. The opinion in that case says that the plea *ne unques*, etc., is a plea in abatement. If that be true and applicable to all cases, then defendant's contention here must fail for want of such plea. It seems to us that the defendant's position cannot be maintained for the reason, also, that section 6, chapter

103, Code, provides that an action of this character may alone be brought by and in the name of the personal representative. He cannot maintain it in his own name, and no other person can maintain it. In such case, a plea to the merits, even under the early authorities referred to, admits the representative character in which the plaintiff sues. This exact question has been passed upon by many courts of last resort in this country; and universally, so far as we have examined, they hold that a plea to the merits in this kind of action admits the representative character in which the plaintiff sues. *Denver etc. Ry. Co.* v. *Woodward, supra; Union Ry. & T. Co.* v. *Shacklet*, 119 Ill. 232; *Chicago & Alton Railroad Co.* v. *Smith*, 180 Ill. 453; *Louisville & Nashville Ry. Co.* v. *Trammell*, 93 Ala. 350; *Atchison, T. & S. F. Ry. Co.* v. *McFarland*, (Kan.) 43 Pac. Rep. 788; *Ewen* v. *Chicago & N. W. Ry. Co.*, 38 Wis. 614; *Hodges* v. *Kimball et al.*, 91 Fed. 845. The last case mentioned arose under the Virginia statute, and was decided by the circuit court of appeals of the United States in 1899. The plea of not guilty in this action admits the character in which the plaintiff sues.

Defendant also contends that the plaintiff cannot recover because of a variance between the averments of the declaration and the proof. The exact point of variance claimed is this: The declaration avers that a large piece of metal of the exploded boiler struck Mrs. Rabbett, inflicting severe and fatal injuries, etc. Mrs. Boyd, the only witness on this point, says: "It was the timbers that struck Mrs. Rabbett. I can't remember very clearly, it was such a crash that I don't remember much about it, and at that time I was knocked down myself, and she was lying under the table." It will be observed that the alleged variance does not relate to the cause of the injury, or to the manner in which it was produced, but solely to the instrument with which it was inflicted. If the timbers from the house, loosened by the piece of boiler, instead of the piece of boiler, struck Mrs. Rabbett, still the primary cause of the injury is the same. It is contended that no connection is shown between the timbers which struck Mrs. Rabbett and the piece of boiler. There may be no direct evidence showing the connection, but circumstances and facts are shown from which the connection may legitimately be inferred; and the plaintiff, upon the

motion to exclude his evidence, is entitled to the benefit of all legitimate inferences of fact which may be drawn from the evidence. It is shown that the piece of boiler, weighing about seven tons, crashed through the house of Mrs. Rabbett, partly destroying it and an adjacent house, also belonging to her; and that at the same time Mrs. Rabbett, sitting on a chair in her house, was struck by the timbers. What timbers? It seems to us that it would be legitimate for a jury to infer that the timbers which struck her were the timbers of the house, which was partially destroyed by the crashing through it of the piece of boiler. Upon the subject of variance we are cited to *Hawker* v. *B. & O. R. R. Co.*, 15 W. Va. 628, and *Young* v. *W. Va. C. & P. Ry. Co.*, 42 W. Va. 112. Neither of these cases relate to a variance as to the instrument with which a bodily injury was inflicted. It is conceded by the brief of defendant that it was wholly unnecessary for the plaintiff to allege that either the piece of boiler or the timbers struck Mrs. Rabbett, and that the statement of the cause of action was sufficient without averring the particular instrument which struck her. Having alleged the primary or main act of omission or commission causing the injury, it was unnecessary for the plaintiff to aver the particular facts going to prove negligence. *Snyder* v. *Wheeling Elec. Co.*, 43 W. Va. 661. We have in the case at bar a variance alone as to the instrument. The averment is one which it was not essential to make, and which was not necessary to the statement of the cause of action. Under the general rule, such a variance is immaterial, and may be disregarded as surplusage. 1 Chitty Pl. (11 Am. ed.) 229; *Stevens* v. *Freidman*, 58 W. Va. 79. Mr. Hogg, in his Pl. & Forms, section 137, p. 111, says: "The rule respecting variances may be stated to be: that if the entire averment can be expunged without affecting the right to recover, it need not be proved; but if it cannot thus be stricken from the declaration without getting rid of a part essential to the cause of action, then, though the averment be more particular than it need have been, the whole must be proved, or the plaintiff cannot recover." It has been held from a very early date, even in criminal cases, that an averment descriptive of the instrument by which a bodily injury was inflicted need not be strictly proved, provided it is proved in substance. A vari-

ance in this respect was not considered fatal at common law, in cases where the instrument laid and the instrument proved were of the same nature and character. 22 Enc. Pl. & Pr. 584. In *People* v. *Colt*, 3 Hill (N. Y.) 432, it was held that an allegation of cutting with a hatchet and proof of shooting with a pistol are not variant. In *State* v. *Dame*, 11 N. H. 271, it was held that an indictment for an assault with a basket knife is supported by evidence of an assault with a basket iron. In *Ryan* v. *State*, 52 Ind. 167, it was held that an allegation that an assault was committed by shooting and striking with a gun and proof of beating with a stone are not variant. Other cases might be cited. See Underhill Crim. Ev., section 314; 1 Whart. Crim. Law 519. In this case, the instrument averred and the instrument proved are of like nature, and the variance is wholly immaterial and should be disregarded.

We will now consider the assignments of error made by the plaintiff. Plaintiff complains because the lower court sustained objections to numerous questions propounded to his witnesses. These questions are embodied in twelve several bills of exceptions. From these bills, it appears that the questions were not answered, and that no statement was made during the trial of what plaintiff expected to prove by the answers to these questions. When the bills of exceptions were signed by the judge in vacation, after the judgment was entered and the term adjourned, the plaintiff's attorney stated to the judge what he expected to prove by such answers, and his statement is incorporated in the bills. It also appears, by a separate bill of exceptions, that after the motion to exclude plaintiff's evidence and direct a verdict for defendant had been sustained, and before the jury had returned its verdict, the plaintiff moved the court to allow him to recall the witnesses to whom said questions had been propounded, for the purpose of taking their statements as to what they would have testified had the objections not been sustained, which motion to recall the witnesses was denied. No statement of what plaintiff expected to prove by the witnesses was made at the time of the motion to recall them. It is contended that the said questions, taken with the facts appearing, show that the questions were relevant to the issue and proper in form; that therefore the answers need not appear; and that

the plaintiff need not disclose what he intended to prove by such answers. The questions, objections to which were sustained, are as follows:

(1) "State what was the condition of this engine, prior to these repairs that rendered it necessary to make these repairs?" (2) "State the condition of the stays and bolts in the piece of the boiler shell of engine No. 19, lying in the house of deceased, I mean soon after this accident. State whether you were able to determine whether or not the stays were recently broken, or whether they or some of them had been broken before the explosion?" (3) "State whether you observed the number, location and condition of the bolts or parts of bolts that were in this part of the boiler shell, and if so what was the condition thereof?" (4) "In your examination of the bolts and stay-bolts in the part of the jacket, or shell, that was in the house of Mrs. Rabbett, did you observe and can you state whether said bolts or stay-bolts were, or any of them were, recently broken by force of the explosion, or whether they had been previously broken; if so, the condition and appearance of said bolts?" (5) "State whether or not any of those bolts, where they connected to the boiler shell, were broken off by you, and if so, state how you did it?" (6) "State whether or not these exposed ends were bright, and bore the appearance of new metal exposed, or whether those ends were discolored, either by corrosion or any other cause?" (7) "That afternoon (Oct. 21st, 1903), state to the jury whether that engine boiler (No. 19) was in ordinary good working order or not?" (8) "State whether as conductor of the crew having engine No. 19 in charge on the afternoon of said explosion, and a few minutes before the explosion, you notified the Superintendent of the Railroad Shops of the defendant that said engine and boiler was out of repair and refused to operate properly, and if so, what was said or done by said Superintendent?" (9) "If you examined or observed the condition of the stays and bolts, with which the jacket of said boiler had been fastened, and observed whether said bolts appeared to have been recently broken, or whether some of them bore the appearance of having been broken or severed prior to the explosion of the boiler,—please state how many and what the condition of the said bolts appeared to be?" 10. "If you examined the

metal of said boiler shell on the side that had been inside, next to the water space, and observed any defects, pits or decayed places therein, please state the nature and appearance of the same?" (11) "Were you present at the premises of Mrs. Rabbett soon after the explosion of the boiler, in Oct., 1903, and examined and observed the condition of the boiler shell on said premises, as to whether said metal had any defects in the metal thereof, such as pits, rust holes, or other defects, please state about it?" (12) "If you made an examination of the stays and bolts that had been used in fastening the said shells of said boiler together, please state whether or not said bolts showed that they had all been recently broken, or whether some of them bore evidence of having been broken or destroyed prior to said explosion, and if so please state how many of said bolts appeared to have been broken, prior to said explosion, and what the indications and appearances were?"

Question (1) was propounded to witness J. W. Poling, whose former occupation was boiler making and whose present occupation is plumbing. This witness worked on repairs to this particular locomotive. The repairs referred to were made three or four years before the witness testified, when he was an apprentice boy, and at a time when he could not be said to have possessed the expert knowledge necessary to qualify him to speak as to the condition of the locomotive. Questions (7) and (8) were propounded to a railroad yard conductor, who was not shown to have had any expert knowledge as to the nature and construction of a locomotive engine and boiler; and while it was proper to prove by him what he did as conductor, having in control this locomotive and its crew, as indicated in question (8), it was not proper, without a showing of expert knowledge on his part, to prove by him whether or not the engine was in good working order. *McKelvey* v. *C. & O. R. Ry. Co.*, 35 W. Va. 500. The objections to questions (1) and (7) should have been sustained, even if the plaintiff had stated what he expected to prove by answers to them. The other questions mentioned relate to the condition and appearance of the piece of boiler at the residence of Mrs. Rabbett as to pits, rust holes, etc., and to the condition of the stays or bolts in such piece of boiler and their appearance as to recent breaks or otherwise. The

plaintiff avers both a defective and mismanaged engine and boiler, and that the engine and boiler were old and worn out, that the stays or bolts thereof were burned in two and broken, and that the metal of the boiler was rotten and not sufficient to hold the bolts and rivets, and that the boiler was otherwise defective. The questions mentioned certainly were relevant to the issue. *Veith* v. *Salt Co.*, 51 W.Va. 96. It is suggested that these questions were propounded to witnesses who were non-experts as to the nature and construction of locomotive engines and boilers, and that answers to these questions would necessarily require expert knowledge in that regard on the part of the witnesses under the rule of *McKelvey* v. *C. & O. Ry. Co.*, *supra*. We cannot say that answers to these questions would necessarily require such expert knowledge. The condition of a piece of metal as to rust holes, etc., and the the appearance of stays or bolts as to recent break, are matters not of expert but common knowledge. It is common, and not expert, observation that recently broken metal presents a bright appearance, while an old break in metal presents a rusty or corroded appearance. The fact that the metal had once been in a boiler did not change its nature as metal, or prevent one from describing its condition and appearance in the particulars mentioned, without having expert knowledge as to the wonderful nature and construction of a locomotive engine and boiler. The fact that these questions were relevant and proper did not relieve the plaintiff from stating to the court what he expected to prove by the answers, as the witnesses did not answer the questions. It may be said that some of our previous cases indicate that the relevancy of the question is sufficient; but this subject has been recently re-examined and reconsidered by this Court in the case of *State* v. *Clifford*, 59 W. Va. 1, in which JUDGE POFFENBARGER delivered the opinion, reviewing the authorities, including our previous cases, and after full and careful consideration it was held that "refusal of the court to permit a witness to answer a question which by its own terms and subject-matter, taken in connection with facts and circumstances already in evidence, shows its relevancy and materiality, is not available as error on a motion for a new trial, if the expected answer of the witness was not disclosed to the court at the time of the ruling. An appellate court, in

reviewing a judgment on a writ of error, cannot assume in such case that an answer favorable to the exceptor would have been given. So much of the decision in *Gunn* v. *R. R. Co.*, 36 W. Va. 165, as conflicts with this principle is disapproved." This principle applies with equal force to the motion to recall the witnesses, no statement being then made of what it was expected to prove by them if recalled. It seems almost unnecessary to notice the fact that the plaintiff's attorney, after the judgment was entered and the term ended, stated to the judge, when the bills of exceptions were signed, what he had expected to prove. This, of course, came too late. Under the circumstances appearing, no prejudicial error is shown in the action of the court in sustaining said objections, or in denying the motion to recall the witnesses.

The plaintiff complains of the rejection of the deposition of W. W. Ensign, taken in Pittsburg, Pa. This deposition appears in full by bill of exceptions. The court at first admitted the deposition, and afterwards, upon objections to the several questions and answers thereof, sustained the objections and rejected the deposition. The defendant made certain general objections to the reading of the whole deposition: first, that it is not under the seal of the notary before whom it was taken. As to this objection, section 33, chapter 130, Code, and *Bohn* v. *Zeigler*, 44 W. Va. 402, are in point. Said section 33 provides: "In any pending case the deposition of a witness, whether a party to the suit or not, may, without any commission, be taken in or out of this State by a justice or a notary public, or by a commissioner in chancery, or before any officer authorized to take depositions in the county or state where they may be taken, and if certified under his hand, may be received without proof of the signature of such certificate." We cannot hold, against the positive terms of this statute, that a deposition which meets the requirements thereof may not be received if otherwise proper.

The second general objection to the deposition is that there was no affidavit that the witness resided out of this State, and that it does not appear from the deposition that the witness did or does now reside out of this State. The deposition shows that the witness resided out of the State when his deposition was taken, on the 14th of January, 1905. It was not

claimed, and it did not appear, that the witness was in this State when the deposition was offered. If the deposition was otherwise proper this objection, as well as the general objection first mentioned, should have been overruled. See *Hoopes* v. *Devaughn et al.*, 43 W. Va. 447; *Abbott* v. *L'Hommedieu*, 10 W. Va. 677; *Taylor* v. *Smith*, 10 Grat. 557; *Pollard's Heirs* v. *Lively*, 2 Grat. 216; *Nuckols, Adm'r.*, v. *Jones*, 8 Grat. 267.

It is contended by defendant that the witness Ensign does not by his evidence show that he is an expert in relation to the nature and construction of locomotive engines and boilers, concerning which he testified. The evidence of this witness shows that he is a mechanical engineer of considerable experience, and when asked, "In the discharge of your duties have you ever had occasion to inspect or do any work on locomotive boilers, and are you acquainted with the mechanism of such boilers?" he replied, "Yes." This witness appears to be qualified as an expert, although he further says that he never inspected locomotive boilers. The weight to be given to his testimony was for the jury. 2 Elliott on Ev. sections 1038-9, 1052; 17 Cyc. 39. An expert witness may give an opinion, in a proper case, based on his own knowledge of facts disclosed in his testimony; or he may give his opinion upon facts shown in evidence, and assumed in a hypothetical question submitted to him. 2 Elliott on Ev., section 1116. This action is founded on negligence. It is the duty of the plaintiff to show affirmatively that the defendant has been negligent. Negligence will not be presumed alone from the fact that the boiler of the locomotive, in use in lawful business upon the tracks of the defendant, exploded. In this respect, the case is governed by *Veith* v. *Salt Co.*, *supra*. See also 3 Elliott on Railroads, section 1299; *Texas* v. *Pac. Ry. Co.*, 106 U. S. 617. We quote from the evidence of the plaintiff as follows: "I didn't notice the actual size of the bolts when new and gone in the construction of this boiler but I did notice that they were broken off and half rotted in."

* * * * "Q. Were there any considerable number and if so about how many of those bolts pulled out or broken out of this shell or jacket of the boiler that was there? A. There was a great many. Q. About how many of such bolts did you observe that were less in size than the uniform size at

the place where they connected with the boiler shell? A. That I answered a minute ago. I said I didn't know exactly how many but some of them were so that I could pull them off. Q. State as near as you can the extent, whether a third or a half or as near as you can state it, that such bolts were reduced in size below the uniform size? A. Well all bolts that are in water—. Q. Just answer the question. A. Where they were connected to the boiler they were reduced quite considerable and had a cast like iron corrodes around those bolts at that time." We also quote from the evidence of witness Bernard, who was a boiler maker, as follows: "Well, I understand that the bolt is in one whole piece that connects the two sheets together, and if that bolt is broken in any place between the two sheets it will corrode on the end, and that was the evidence I have and the only thing I seen that the bolts was corroded on the end." It is claimed that, with this evidence admitted, it was improper to reject the whole deposition. That part of the deposition beginning with question 4 and including the answer to question 6, does not appear to relate to facts which the evidence previously admitted tended to prove, and the rejection of this part was not error to plaintiff's prejudice. This part of the deposition relates principally to the life of a locomotive, and to the time it may be used before it will be unfit for use or repair. No evidence was introduced showing the age of the locomotive in question. The part of the deposition beginning with question 7 and ending with the answer to question 15, should have been admitted, in view of the evidence previously admitted for the plaintiff. This part of the deposition related to the necessity of stays or bolts, and to the effect of broken or defective stays or bolts upon the safety of the boiler, and to the ability of a boiler maker or inspector to detect a broken or destroyed bolt, and to other pertinent matters. The part of the deposition beginning with question 16 and ending with the answer to question 21, does not appear, upon consideration of the evidence admitted, to be relevant, and its rejection was not error. The part of the deposition beginning with question 1 and ending with the answer to question 3, relating to the age, residence and expert knowledge of the witness, should have been admitted.

The part of the deposition offered which should have been

admitted was improperly rejected, to the plaintiff's prejudice; and for this error we must reverse the judgment complained of, set aside the verdict, award a new trial, and remand the cause for further proceedings according to law. As this case must be remanded for a new trial, we express no opinion as to the sufficiency of the evidence introduced upon the former trial to sustain the plaintiff's case.

Reversed. Remanded.

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CHARLESTON

RUFFNER BROTHERS v. DUTCHESS INSURANCE CO.

Submitted March 8, 1906. Decided April 17, 1906.

1. INSURANCE—*Inventory.*
An inventory of a stock of merchandise, within the meaning of the term "inventory" used in what is known as "The Iron Safe Clause" of a fire insurance policy, is a list of all the articles of merchandise in the stock, sufficiently itemized to show the kinds and numbers or quantities thereof, together with their values at the time of making the same, as nearly as they can be ascertained. (p. 434.)

2. INSURANCE—*Inventory.*
In the case of a store, opening with an entirely new stock of goods, at or about the date of the issuance of the policy, the invoices of the first lot of goods put into it, giving the quantities thereof by items, with the cost prices, if preserved and kept for production, upon the demand of the insurer, as and for an inventory, will constitute such a list, and the insured will have substantially complied with so much of the policy as requires the taking of an inventory. (p. 434.)

3. INSURANCE—*Inventory.*
In determining what constitutes such an inventory, regard must be had to the purpose for which it is required, and, in seeking this, all parts of the "Iron Safe Clause" should be read and considered together. (p. 435.)

4. FIRE INSURANCE POLICY—*Waiver of Breach—Agent—Estopped.*
Cancellation of a fire insurance policy, by an agent of the company, having no authority to waive conditions, except by endorse-

ment on the policy or addition thereto, does not imply a waiver of a breach, previously made, of a promissory warranty therein contained, or estop the company from relying upon such breach as matter of defense to an action on the policy, though it be shown that the agents had knowledge of such breach. (p. 436.)

5. INSURANCE POLICY—*Waiver—Cancellation of Policy.*

Violation of a clause of an insurance policy, declaring that it shall become null and void, if the hazard be increased by any means within the control or knowledge of the insured, is not waived by a letter, written at about the date of the fire, which caused the destruction of the property, by an agent of the company, having no authority to waive conditions, except by endorsement on the policy or addition thereto, notifying the insured that the policy is cancelled, and specifying said violation as the reason for cancelling it. (p. 436.)

6. JUDGMENT BY APPELLATE COURT—*Reversal for Insufficiency of Evidence.*

This Court on reversing a judgment for the plaintiff, and setting aside a verdict, for insufficiency of evidence, and refusal of the trial court to exclude the evidence from the jury and direct a verdict for the defendant, will not remand the case for a new trial, but will render judgment for the defendant, when it does not appear that injustice will be done thereby. [By four judges, POFFENBARGER, Judge, dissenting.] (p. 439.)

Appeal from Circuit Court, Kanawha County.

Action by Ruffner Brothers against Dutchess Insurance Company. Judgment for defendant and plaintiffs appeal.

Reversed. Judgment for Defendant.

CHILTON, MACCORKLE & CHILTON and MURRAY BRIGGS, for plaintiff in error.

MOLLOHAN, MCCLINTIC & MATHEWS, for defendants in error.

POFFENBARGER, JUDGE:

The Dutchess Insurance Company complains of a judgment for the sum of $649.12, rendered against it by the circuit court of Kanawha county, on the 27th day of March, 1905, in favor of Ruffner Brothers, assignees of A. Haws and his son, H. H. Haws, who were doing business as The Haws Company.

The policy of insurance, under which the loss, sustained by The Haws Company, occurred, had covered a frame store building, a stock of general merchandise kept therein, and

the store and office furniture and fixtures. The stock of goods so insured was entirely new at the time of the issuance of the policy. After the policy had been in force a short time, an addition to the building in which the store was kept was made for the accommodation of a steam grist mill, and the mill installed therein and operated to an extent not clearly indicated, before the fire occurred. In the meantime, Haws had attempted to obtain insurance on the mill from the agents from whom he had secured the policy on the store. They had declined it, and he had vainly tried to obtain it from another agency. Some days before the fire occurred, a member of the firm of Lohmeyer and Goshorn, the agents, had informed him they would give him no insurance on the mill, but they would carry his store at a six per cent rate, which was an increase of four per cent over that of the policy he then had.

The defenses relied upon by the defendant were two in number: first, non-compliance with that part of the Iron Safe Clause which required an inventory to be made within thirty days from the issuance of the policy, unless one had been taken within twelve calendar months prior to the date of its issue; and, second, violation of that clause of the policy which declared it would become void if the hazard should be increased by any means within the control or knowledge of the insured, unless permitted or waived by an endorsement on the policy or attached thereto.

As constituting substantial compliance with the requirement of an inventory, the plaintiff relied upon his invoices or bills. He reasonably contended that, it being a new store, the first lot of goods having been placed in it but a few days before the issuance of the policy, these bills constituted a complete list, by items, with the values annexed, of all the goods that had been put into the store. At the date on which the first lot was taken into the store and put upon the shelves, the invoices therefor, made up as complete and accurate a list of the goods as if they had been re-listed into a book. All goods subsequently put in, for which bills were likewise received and kept, were additions to the stock. The purpose and object of an invoice is not very clearly defined in insurance law. Most of the courts, in dealing with it, simply refer to the legal definition of the term inventory. This falls

far short of indicating what it is intended for, the function it performs between the parties. It seems to me perfectly plain that the requirement is intended to secure, in the interest of the insurance company, and possibly both parties, a basis, or starting point, upon which to found an estimate of the value of the stock in case of a loss. It, of itself, indicates nothing except the quantum and value of the stock at the time of the taking thereof. It does not indicate what they amounted to at any previous or subsequent date, nor the average stock. Having an inventory at a given date, however, and the invoices for goods subsequently put in, the determination of the aggregate value of all the goods in the store at the date of the inventory and those subsequently put in, is a mere matter of addition. All insurance policies on merchandise require the production of the invoices as well as the inventory. Another requirement which goes with the inventory and the bills, as an ally, in working out the estimate, is the book in which the account of sales is kept. After ascertaining, from the inventory and the bills for the goods subsequently put in, the aggregate as above stated, the quantities and values of the goods sold out of the store are deducted, and thus a fair and reasonable indication, as to the quantities and value of the goods at the date of the fire, is obtained. The three clauses of the iron safe provision require the inventory and keeping of the books and their protection by means of the iron safe. In determining what they mean, what more reasonable view could be taken than that they must be all construed together? Some courts exclude the invoices and deny to them the force and effect of an inventory, upon the fanciful ground that they are no index to the value of the goods. What better evidence of the value of the goods could there possibly be than the bills showing what they had cost? They show the value as agreed upon between the owner of the store and a disinterested third party, while an inventory would show the value according to an estimate put upon them by an interested party, knowing that an inventory was made for the purpose of forming the basis of a claim against the insurance company. I am utterly unable to see any force in that contention. Of course the invoices would not constitute an inventory in the case of a store which has been running for a considerable time. They would

not afford any basis upon which to begin the estimate, but in the case of a new store starting simultaneously with the issuance of the policy, or practically so, the first bill constitutes as good a basis for the beginning of the estimate as an inventory could possibly afford. It has been suggested in one or two instances that, if the bills were pinned together and some endorsement made upon them, indicating an intention to treat them as an inventory, they might, on the theory of substantial compliance, be deemed to constitute an inventory. In other words, they constitute an inventory if they are indorsed "inventory," otherwise they do not. This, to my mind, puts more merit into the name of the thing than it is entitled to. It sacrifices substance to mere form and technicality. What is an inventory, is to be determined in view of the peculiar circumstances of the case. What would substantially comply with the requirement in one case would not in another in which the circumstances are wholly different. For these reasons, we are unwilling to follow *Insurance Co.* v. *Knight*, 36 S. E. 821, *Fire Association* v. *Mosterson*, 25 Tex. Civ. App. 518, and the Mississippi case in which the proposition advanced by the attorneys for the plaintiff in error arose, and we hold that the evidence is sufficient to sustain the finding of the jury in favor of the plaintiff on the first issue.

The violation of the clause against increase of hazard is admitted, but it is insisted that there was a waiver on the part of the defendant. The claim of waiver is predicated upon the knowledge which the agent of the defendant company had, at the time of the issuance of the policy, of the intention of the insured to build the addition to the store house and install a grist mill in it, and of the actual consummation of this design before the fire occurred, and upon a letter written by them to the insured, dated the day of the fire, but received on the day after that occurrence. The store was destroyed about ten o'clock on the night of December 23rd, and the letter was postmarked 1:30 A. M., December 24th. It reads as follows:

"A. Haws Esq City:—Dear Sir—We again call your attention to policy No. 3379 Dutchess Insurance Company covering on your building, stock and fixtures, which has not yet been returned to us for cancellation. We desire now to

notify you that the policy is cancelled on account of the grist mill exposure and of no effect, if you will return it the return premium will be paid to you. The policy referred to is in the name of 'The Haws Co.' Yours very truly, (signed) Lohmeyer & Goshorn."

The claim of waiver is stated in two ways. One is that cancellation of the policy necessarily implies that the party cancelling it deemed it to be, at the date of cancellation, in full force and effect, otherwise there would be a contradiction in terms and an inconsistency in conduct. To cancel means to make void, to annul, to destroy, and it is said that that which has no existence or is not valid or of any effect, cannot be annulled, made void or destroyed. The view that a breach of a condition or warranty in an insurance policy does not make it absolutely void, but only voidable, would be a sufficient answer to this contention. Many cases hold that such is the effect. *Insurance Co.* v. *Heiduk*, 46 N. W. 481. To the same effect are the decisions in Illinois, Missouri, Michigan and Iowa. If not absolutely void, but only voidable, there would be no inconsistency in the act of cancellation by which it would be utterly destroyed. Moreover, no such implication is recognized by the courts. Deeds, contracts and other instruments are frequently cancelled, by courts of equity, on the express ground that they are void, for some reason shown, by way of removing cloud from title, or preventing some use of the instrument which might be injurious to the plaintiff. Formerly it was held that a court of equity would not cancel a deed or other instrument which was void on its face, but the weight of authority now seems to be that such instruments will be cancelled. Appeals are entertained by this and other courts from void judgments and decrees, notwithstanding the apparent implication raised by entertaining them that there is a judgment or decree. In order to put the question beyond doubt and dispose of it upon non-technical grounds, it may be said there is no contradiction or inconsistency in the act of cancellation, and that it does not raise any implication of the continued life of the policy. It is an absolute right conferred upon the insurer by the terms of the policy independently of any cause. It might be exercised at any time, with or without cause. Therefore, a cancellation does not imply even

that there was any cause of forfeiture, much less the additional fact that such cause was waived. The two things are in no sense connected or interdependent. A cause of forfeiture may be asserted, although no cancellation was ever made or attempted. If there had been no cancellation in this case, the defense could have been set up as fully and unreservedly as it has been. Even if it be admitted that the increase of hazard rendered the policy absolutely void, neither that fact, nor the right to rely upon it as a defense, had any connection whatever with the right of cancellation; and, if we say it rendered it void, the insurer might consistently exercise the right of cancellation in order to preclude the setting up of any claim under the policy, although void. In testing this question, it is proper to look beyond the facts of the particular case and see how the theory advanced would operate under other conditions. Take a case in which the insurer knows nothing of the cause of forfeiture at the time of the cancellation. Could it reasonably be said to have waived that of which it had had no knowledge? The argument advanced here would produce a waiver in that case.

The other theory of waiver is that the letter, although not physically attached to the policy, may be deemed in law to be added thereto, and to constitute a waiver in writing by the agents. That they had authority to execute such a waiver, or to grant permission, to do that which would increase the hazard, provided they did it by an endorsement upon the policy or a writing annexed to it, is not denied or questioned. Whether, if a waiver, it might be regarded as annexed to the policy, it is not necessary to say; for this paper does not, in express terms, waive the breach of the condition, nor, viewed in the light of the facts and circumstances, can it be construed to be a waiver. Its terms import the exact contrary of a waiver. The reference in it to the mill, as the reason for cancellation, plainly negatives intent to assume the additional risk. The letter expresses dissatisfaction with the conduct of the insured. On account thereof, he is notified that the policy is cancelled. There is not a word in the letter which expresses waiver or any intention to waive. There is no reference to liability or a claim of liability on the policy. As to whether the company is liable, or whether it will forego any right to defend on the ground of violation

of warranty or condition, the letter is absolutely silent. No reference whatever is made to the respective rights of the parties under it. Moreover, it bears on its face an implication that there had been a previous demand for the return of the policy. It begins by saying, "We again call your attention to policy No. 3379," &c. In point of fact, there may not have been any such demand, but whether true or false, it reflects intent on the part of the writers, and tends to negative any intention to waive the violation of conditions. In point of fact, the insured had been plainly informed that the company would not carry his building and store, at the price for which it had issued the policy, and that, in order to obtain a continuation of the protection afforded him by the policy, he would have to pay a premium three times as large. Having given him this notice, the agents might very reasonably have expected him to return the policy and make a new contract. For these reasons, our conclusion is that the letter does not constitutute a waiver, and that as the jury predicated its verdict upon the theory of a waiver, as shown by answers to special interrogatories, the court should have set aside the verdict.

The trial court further erred in refusing to exclude the evidence and to instruct the jury to render a verdict for the defendant, for the evidence establishes fully and clearly a violation of the warranty against increase of hazard. The plaintiff admitted the construction of the addition to the store room, the installation therein of a grist mill, the operation thereof and a material increase of hazard. These motions having been overruled, the case went to the jury under instructions, given at the request of both parties. Of the twelve asked for by the defendant, four were given and eight refused, and it excepted. It excepted further to the action of the court in giving one of plaintiff's instructions. In view of the judgment to be rendered here, refusing a new trial, it is unnecessary to examine the instructions.

The reasons which, in the opinion of the majority of the court, justify the rendition of judgment for the defendant here, and impel them to refuse to remand the case, with liberty for a new trial, are set forth in the opinion of JUDGE BRANNON in *Maupin* v. *Insurance Co.*, 53 W. Va. 557, and by JUDGE SANDERS in *Anderson* v. *Tug River Coal Co.*, de-

cided at this term. As I wholly dissented in the *Maupin case*, I expressed no opinion, concerning the propriety of rendering judgment for the defendant. Now, however, having carefully examined the authorities, analyzed them as best I can, and reached the conclusion that this action, on the part of the appellate court, is a violation of well settled legal principles, as well as a radical departure from the previous practice of this Court, I feel called upon to dissent from it and register my protest against it.

In those states in which this practice prevails, no distinction is made between cases in which the sufficiency of evidence to sustain the verdict is tested by a motion to exclude, made at the close of the plaintiff's evidence, a motion to direct a verdict at the conclusion of the whole evidence, and a motion to set aside the verdict after the rendition thereof. They apply it generally, simply saying that as they can clearly see that no better case can be made, or that it does not affirmatively appear that it can be done, they, therefore, refuse to remand. Such is the rule in Illinois, Georgia, Maryland, Michigan, Iowa, Washington and Misssuri. *Sanger* v. *Howard*, 147 Ill. 304; *Siddall* v. *Jansen*, 143 Ill. 543; *Neer* v. *Railroad Co.*, 138 Ill. 29; *Brink* v. *Morton*, 2 Ia. 411; *Herring* v. *Hawk*, 1 Mich. 501; *Mud* v. *Harper*, 1 Md. 110; *Gault* v. *Oring*, 6 Gill 191; *Stockton* v. *Frey*, 4 Gill 406; *Dayton* v. *Hooker*, 45 Mich. 153; *Rutledge* v. *Railway Co.*, 123 Mo. 141; *Carroll* v. *Transit Co.*, 107 Mo. 653; *Bernhard* v. *Reeves*, 6 Wash. 424.

In all the above named states, except Washington, the practice seems to be settled. In that state, however, a later decision, *Edmunds* v. *Black*, 13 Wash. 490, enunciates a contrary doctrine, holding that there must be a remand to the lower court when the evidence is insufficient to sustain a verdict. In that case, there was no evidence whatever to sustain it. In the case in 6 Wash. above cited, the matter seems not to have been discussed, but in the latter case it was, and, upon a careful review of the authorities, the court deliberately decided the question. In Arkansas the statute gives to the appellate court the broad power of rendering such judgments as justice may require. Even under that, the court took the view that it was unjust, and, therefore, violative of law, to refuse to remand a case upon reversing a

judgment for insufficiency of evidence, since, for aught the court knows, a better case can be made on a new trial. *Pennington* v. *Underwood*, 56 Ark. 53. In some other states, it has been held that, although the court has the power to refuse a new trial, it will only do so when it clearly appears that the plaintiff cannot better his case. This is the law in Wisconsin, but that court remands, when the verdict is unsupported by any evidence whatever, because it will not assume that the plaintiff cannot furnish the evidence to sustain his declaration. *Wright* v. *Rindskoph*, 43 Wis. 344. Such is the rule in Texas also. *Willoughly* v. *Townsend*, 93 Tex. 80; *Boettcher* v. *Prude*, 32 Tex. 472.

The best exposition of the rule in Pennsylvania is found in *Railroad Co.* v. *Norton*, 24 Pa. St. 465, in which the court said: "The plaintiff's declaration contained a good cause of action, and in such cases where we reverse, we always award a *venire de novo*, both because he may, on a second trial, find evidence to support his *narr.*, and because it is necessary to enable the defendant to recover his costs if the plaintiff fail to make out his case in evidence." Some other Pennsylvania cases are cited by the text-writers as being in conflict with this, but they will be found upon examination not to be. One of these is *Miller* v. *Ralston*, 1 S. & R. (Pa.) 309. The action was brought before the debt was due and the court refused a new trial because it appeaaed that there was no cause of action, nor even a pretense of one. Another is *Griffith* v. *Eshelman*, 4 Watts (Pa.) 51. There, it appeared from the plaintiff's declaration that he had no cause of action. His declaration was incurably bad. It was not a case of insufficiency of evidence nor one in which the evidence could be considered at all.

One case is cited from New Jersey, *Hinchman* v. *Clark*, 1 N. J. L. 340, but it stood upon a special verdict, the facts all ascertained. One is cited from Kentucky, *Broaddus* v. *Broaddus*, 10 Bush. 299, in which the court say they will remand except where there is no evidence to sustain the verdict. By what process of reasoning this conclusion was reached is not in any way indicated. Nothing is said about it in the opinion.

In South Carolina the sufficiency of the evidence is tested on the defendant's motion to nonsuit the plaintiff. In

Townes v. *Augusta*, 46 S. C. 15, the supreme court of that state, upon mature consideration, announced the rule as follows: "If the nonsuit was improperly refused, and the nature of the plaintiff's demand was such that no recovery could be lawfully had, this court will grant the motion, and dismiss the plaintiff's complaint. If, however, it was merely a case of insufficiency of proofs adduced at the trial to support the cause of action in itself of a proper and legal nature, this court will not dismiss the complaint upon appeal, but order a new trial, to afford the plaintiff an opportunity to make better proofs." I understand the distinction here stated to be the same as the one made by the Pennsylvania and New York courts, namely, if the declaration sets forth matter which does not, and cannot, constitute a good cause of action, final judgment of dismissal will be rendered by the appellate court, but if the declaration be good or curable by amendment, the case will be remanded.

The procedure in New York is under a statute which authorizes the appellate court to reverse or affirm, wholly or in part, or to modify, the judgment appealed from, and to grant a new trial if necessary or proper and to grant to either party the judgment which the facts warrant. Under an authority so broad and discretionary as that, the New York court of last resort has solemnly declared over and over that the appellate court cannot properly render final jurdgment for the appellant, unless the facts are conceded or undisputed, or are established by official record or found by the trial court, or it appears that no possible state of proof applicable to the issues will entitle the respondent to judgment. *Benedict* v. *Arnoughs*, 154 N. Y. 715; *Edmoston* v. *McLoud*, 16 N. Y. 543; *Hendrickson* v. *City of New York*, 160 N. Y. 144; *New* v. *Village*, 158 N. Y. 41.

Certain decisions of the Supreme Court of the United States are sometimes cited for the proposition that, on reversing a judgment for insufficiency of evidence, on a motion to set aside, or refusal of a direction to the jury to find for the defendant, it will enter final judgment. This is a misapprehension. Those cases do not assert such a proposition. In all of them the parties waived trial by jury and submitted the matters in difference to the court. That is equivalent to a demurrer to the evidence. By agreement of the parties,

the case is withdrawn from the jury. Both parties voluntarily relinquish the right to a jury trial. *Allen* v. *St. Louis Bank*, 120 U. S. 20; *Rolling Mill* v. *Rhodes*, 121 U. S. 255; *Fort Scott* v. *Hickman*, 112 U. S. 150, cited in the *Maupin case*. In all these cases, it is expressly stated that the trial by jury was waived and the case submitted to the court by a formal written stipulation, When the trial is by a jury and the verdict set aside for want of sufficient evidence, the practice in the Supreme Court of the United States is shown by the decision in *Railroad Co.* v. *Jones*, 95 U. S. 439. The court held that the evidence disclosed a clear and undisputable case of contributory negligence on the part of the plaintiff. The defendant had failed to ask the court to direct a verdict, but had asked an instruction directing the jury to find for the defendant, if they should find that the plaintiff knew the box-car was the proper place for him and that his position on the pilot of the engine was a dangerous one. The court concluded its opinion as follows: "The plaintiff was not entitled to recover. It follows that the court erred in refusing the instruction asked upon this subject. If the company had prayed the court to direct the jury to return a verdict for the defendant it would have been the duty of the court to give such instruction, and error to refuse." Instead of rendering judgment for the defendant, however, the case was remanded with directions to issue a *venire de novo*. How much stronger case could be presented than that? There was an affirmative showing by the plaintiff's own evidence of a fact that effectually barred recovery.

In *Pleasants* v. *Fant*, 22 Wall. 116, the court gives a full exposition of the principles upon which the motion to exclude evidence rests. In the concluding part of the opinion, Mr. Justice Miller said: "It is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor, that is the business of the jury, but conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial." He then shows the absurdity of requiring the

submission of the evidence to the jury under such circumstances and says: "In such case the party can submit to a nonsuit and try his case again if he can strengthen it, except where the local law forbids a nonsuit at that stage of the trial, or if he has done his best he must abide the judgment of the court, subject to a right of review, whether he has made such a case as ought to be submitted to the jury; such a case as a jury might justifiably find for him a verdict." It is to be observed here that that court says that when a motion to direct a verdict is made, the plaintiff has a right to take a nonsuit. He is not bound to let his case be withdrawn from the jury in that way. He may get out of court, for the time being, for the purpose of bettering his case on another trial.

This Court, in *Knight* v. *Cooper*, 36 W. Va. 232, announced the two principles declared by the Supreme Court of the United States. There was a case of insufficiency of the evidence, one in which the court might have directed a verdict, had it been requested, and this Court reversed the judgment, set aside the verdict and remanded the case, suggesting that the trial court, on the same evidence, in another trial, might direct a verdict "first giving the plaintiff an opportunity to suffer a nonsuit if he desired." When an appellate court, on reversing a judgment and setting aside a verdict for insufficiency of the evidence, whether there has been a motion to exclude at the conclusion of plaintiff's evidence, a motion to direct a verdict upon all the evidence, or a motion to set aside the verdict, renders judgment for the defendant, it denies to the plaintiff the opportunity to take a nonsuit. In the case of motions to exclude and direct, he is not given an opportunity to better his case in view of the final action by the court; for the reason that he is under no duty to ask for a nonsuit in the trial court, because the court refuses and overrules the motion. His situation is the same as a plaintiff when his declaration or bill is demurred to. As long as the court rules with him, holding his pleadings sufficient, there is a presumption of correctness, upon which he may rely, and he is under no duty to ask leave to amend. It is only when the court says the pleading is insufficient that the party is put under a duty to ask leave to amend. So where the sufficiency of his evidence is challenged, by a mo-

tion to exclude or direct a verdict, as long as the court rules in his favor, he may well suppose that his evidence is sufficient, and is excused from making application to the court for leave to strengthen it. For the court afterwards to turn around and render a judgment against him, without giving the opportunity to better his condition, which he could have had in the court below, and of which that court could not have deprived him, is to take him by surprise, and do him a rank injustice. Besides, for aught the court can know, except by way of guess, it may grievously injure him. The supreme court of Vermont, in reversing a judgment in which such a motion was made and ought to have been sustained, said: "While we hold that it was the duty of the court to have entertained the defendant's motion to direct a verdict and enter judgment in its favor; and while generally it is the duty of this court to enter such judgment as the trial court should have done, yet, if the trial court had sustained the defendant's motion, the plaintiff might have desired, and been permitted to introduce further evidence, and she may desire to do so on another trial, hence, the cause *is remanded for a new trial.*" *Latremouille* v. *Railway Co.*, 63 Vt. 336. To see how the plaintiff, in such case, may protect himself by exercising his right to take a nonsuit, it is only necessary to bear in mind that the court, in acting upon such a motion, performs two functions. It first determined whether there is sufficient evidence to take the case to the jury. This is a preliminary step. If the court be of opinion that it is not sufficient, then follows the order of exclusion or direction of the verdict. Upon the announcement by the court that, in its opinion, the evidence is insufficient, the plaintiff has an opportunity, before the verdict is rendered under the direction of the court, to take a nonsuit and thereby prevent his case from being taken from the jury by the court in its then condition. He thereby saves to himself his constitutional right of a trial by jury. This principle puts it beyond the power of the defendant and the court to take his case from the jury in that way. Whether that right is a valuable one to him in a particular case, it is not for the court to say, until the defendant has put himself in a position to authorize such action. Though a court may clearly see that no harm, in a practical sense, will result from forcing a defendant to

trial on a bad declaration it can never overrule a demurrer for that reason. He cannot be deprived, for reasons of mere expediency, of his right to require a good declaration or bill before pleading or answering. The law deems that right to be a valuable and sacred one, whether it be so, in the particular case or not, and does not permit any court to assert the contrary. Nor can a court properly deprive a litigant of any other legal right, because, forsooth, the judge cannot see how he is injured thereby. By rendering final judgment in such cases as this, the plaintiff is deprived of his opportunity to better his case. It directly and expressly refuses that which the trial court would have been bound to allow him, had it concluded the evidence was insufficient. The rendition of a judgement by the appellate court, in such a state of the case, works another injury in a legal sense, by putting the parties on an unequal footing. It enables the defendant to have three chances, one before the court and two before the jury, while the plaintiff has but one, a chance before the court. It allows the defendant to make a demurrer to the evidence against the plaintiff, for his own benefit, without subjecting himself to the operation of a demurrer. Upon the court's refusing his motion, he has a chance of a verdict in his favor. If he fails to get that, he comes up to the appellate court, on the issue of law, and has final judgment. If the verdict be for the defendant, however, and the plaintiff is compelled to come to this Court to get rid of it, upon reversing the judgment and setting aside the verdict, he cannot have a final judgment against the defendant, but must go back and give the defendant another chance before the jury. Upon what principle an appellate court can justify such a discrimination between parties, I am unable to see. It is to be remembered in this connection, too, that the subject matter of this discrimination is the constitutional right of a jury trial. It is more than a mere matter of form or technicality, even if it could be set aside and ignored as a matter of form. While the courts and text-writers say a motion to exclude, or direct a verdict, is equivalent to a demurrer to evidence, they do not mean that it is in all respects equivalent thereto, but only that in determining whether it shall be sustained or overruled, the principles governing a demurrer shall apply. Where the parties join in a demurrer, the case is taken from

the jury absolutely as to both parties. Neither has any right to go back to the jury, unless there has been error in admitting or excluding evidence. The whole matter is submitted to the court for final determination. What was said above about the inability of the defendant and the court to take from the plaintiff his right to a trial by jury, was qualified by the phrase "in that way," namely, by a motion to exclude or direct a verdict. I am not to be understood as intimating that the plaintiff cannot be compelled to join in a demurrer. When he is compelled to do so, however, the other party is also compelled to withdraw his case from the jury, so that both parties stand on an equal footing, forever separated from the jury, and their case wholly in the hands of the court.

Very few of those courts, in which the practice of rendering judgment on a reversal obtains, if indeed any, have given this subject careful and mature consideration. They have dismissed it with a few words, usually with the remark that it is not perceived how the plaintiff can make a better case, or that it does not appear that he can do so, wherefore the granting of a new trial will be useless. I have observed that in one or two instances it has been said that it ought to be done in order to put an end to the litigation; but this reason falls under the condemnation of the great weight of authority. Even the courts that have given it, have said in the same breath they would grant a new trial, if they could see that the plaintiff could make a good case, while others have said they would grant it in all instances in which it does not affirmatively appear that the plaintiff could not by any possibility make a good case. All the reasons assigned, by all the courts that indulge in that practice, may be included in that idea of utility or expediency, which utterly ignores legal principles, and, if extended, would lead to the abolition of all forms of action. It would only be necessary to have a judge and a jury, and all pleadings might be dispensed with. The trial of an equity suit on a declaration in debt would be perfectly justifiable. The suggestion that, as the plaintiff has had one trial, he has no legal right to another, is one advanced for the first time, so far as I am able to see, in *Maupin* v. *Insurance Co.* I think he has, unless the defendant has taken the proper step to deprive him of it by a demurrer

to the evidence. Even in that case, it is likely the plaintiff may avoid the effort to bind him, by taking a nonsuit. While he must join in the demurrer or dismiss his action, I do not see that the court can compel him to further prosecute, or elect for him which alternative shall be taken. The statute forbids the taking of a nonsuit after the jury has retired from the bar, but limits the right no further, and I know of no authority in the court to add to it. The right may be of no practical value to him, but it is a legal right of which a court cannot deprive him, except by trampling the law under foot.

Maupin v. *Insurance Co.* is the first decision by this Court in which the rule here enforced was ever applied. No precedent for it will be found in any of the Virginia decisions, prior to the division of the state. Even a fatal variance between the declaration and the proof was not ground for any such action, though it is in some other states. In *Calvert* v. *Bowdoin*, 4 Call. 217, the court laid down this proposition: "If the evidence differs from the statement in the declaration, a judgment of nonsuit will be given by the court of error: and the cause will not be sent back to the court below with a direction to call the plaintiff, or to instruct the jury that the evidence does not support the declaration." Instead of rendering a judgment for the defendant against the plaintiff, and making the matter *res judicata*, the court merely dismissed the action. This is in accord with the rule declared by the South Carolina court and by the Pennsylvania court as above shown.

For these reasons, I am opposed to the departure made in the *Maupin case* and in the case of *Harvey* v. *Coal Co.*, and would remand this case instead of rendering judgment for the defendant. If the defendant desired the case to be taken from the jury, it should have demurred to the evidence and deprived itself of any right to go to the jury, while taking that right from the plaintiff.

BRANNON, JUDGE:

I concur in the judgment, but I doubt point 2 of the syllabus.

CHARLESTON

TETER v. TETER.

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Submitted February 27, 1906. Decided April 17, 1906.

1. CANCELLATION OF INSTRUMENTS—*Undue Influence—Mental Incapacity—Burden of Proof.*

In a suit, brought by a son after the death of his father, to set aside, for mental incompetency and undue influence, deeds made by the father, while aged, infirm and feeble in mind, by which he had granted the whole of his real estate to his wife and a daughter who resided with him, to the exclusion of his other children, all of whom were of mature age, married and residing elsewhere, the burden of proving both undue influence and mental incompetency is upon the plaintiff. (p. 450.)

2. DEEDS—*Mental Capacity of Grantor—Infirmity of Mind.*

Mere infirmity of mind and body is not sufficient to overcome the legal presumption of mental capacity in a grantor. In order to have such effect, the evidence must show that he did not have sufficient understanding to clearly comprehend the nature of the business he was transacting. (p. 456.)

3. EVIDENCE—*Competency of Grantor—Opinion Evidence.*

On the question of the competency of a grantor to execute a deed, the value of the opinions of non-expert witnesses, who have had opportunity to form intelligent opinions, respecting his competency, depends upon the reasons therefor afforded by the facts upon which they are predicated, as stated by the witnesses. Where the opportunities of such witness to obtain knowledge of the grantor's mental condition have been but slight, and the facts given are meager, such evidence is entitled to but little weight. (p. 456.)

4. DEEDS—*Validity—Undue Influence.*

Old age, physical infirmity and disease and feebleness of intellect, on the part of a grantor, together with the fact that he granted the whole of his estate to his wife and one daughter, who resided with him, and upon whom he was dependent for personal care and attention, to the exclusion of all his other children, raise no legal presumption of undue influence. They are only circumstances slightly tending to establish it. (p. 456.)

5. SAME—*Evidence.*

That, in such case, the disposition made of the grantor's property is wholly different from what had previously been intended, as shown by a will executed by him at an earlier date, is a circumstance from which undue influence may, under certain conditions, be inferred; but, if it further appear that, at the time of the

execution of the deed, proceedings were pending for the enforcement of liens upon the grantor's real estate, for the discharge of which no funds were at hand or within reach; and that such indebtedness weighed heavily upon his mind at the time of the execution of both the will and the deed, this circumstance, together with other facts set out in detail in the opinion in the case, affords grounds for a strong inference to the contrary. (p. 461.)

Appeal from Circuit Court, Barbour County.

Bill by W. W. Teter, trustee, against Elizabeth Teter and others. Decree for defendants, and complainant appeals.

Affirmed.

E. D. TALBOTT and J. BLACKBURN WARE, for appellant.

FRED O. BLUE, for appellees.

POFFENBARGER, JUDGE:

From a decree of the circuit court of Barbour county, pronounced May 25, 1904, dismissing a bill in equity in a suit instituted for the cancellation of two deeds, the plaintiff in said bill, W. W. Teter, trustee, has appealed. The deeds in question bore date, respectively, May 1, 1901, and May 13, 1901, the first one of which, executed by Jesse Teter, purported to convey all of his real estate to his wife, Elizabeth Teter, and his daughter, Mertie E. Teter, in consideration of constant services rendered to him and other good and valuable considerations, not named; and the other of which, executed by Jesse Teter, Elizabeth Teter and Mertie Teter, conveyed to the Valley Coal & Coke Company, a corporation, the coal under three tracts of said land, containing, respectively, 165½ acres, 26 77-100 acres and 4 93-100 acres.

The grounds for cancellation set up in the bill are mental weakness and incompetency on the part of the grantor, and undue influence exerted upon him, in obtaining the execution of the deeds, by his wife and daughter Mertie, a married daughter, Mrs. Ida M. Huff, and her husband, Dr. M. M. Huff. The issue thus presented very naturally brought into the record, in addition to the opinions of witnesses, respecting the mental competency of the grantor, his situation and circumstances. Besides the two daughters, he had three other living children, the plaintiff, W. W.

Teter, Floyd Teter and Thomas Benton Teter, all of whom had reached mature manhood and had left his home. Of his family there remained with him only the wife and the daughter, Mertie E. Teter. Mrs. Huff and her husband lived some eighteen miles away at the town of Philippi. His home farm consisted of a tract of 250 acres of land, in addition to which he owned three tracts above mentioned, situated on Zebb's Creek in Barbour county, and an interest in a 300 acre tract of timber land known as the Lime Hill farm and some other real property. It seems that the larger part of the Zebb's Creek land, particularly the 168 acres, described, in the deed conveying the coal, as containing 165 1-2 acres, and a 19 acre tract adjoining it, had at one time belonged to said W. W. Teter, from whom it was sold in 1895, in a creditor's suit, brought by the father, Jesse Teter, and purchased by him at the sale, the son W. W. Teter having been unfortunate in business and lost all his property. Some advancements seem to have been made to Thomas Benton Teter, but nothing to Floyd Teter or Mrs. Huff, so far as the record shows. Jesse Teter, however, by reason of endorsements, from time to time, became liable for debts of Dr. M. M. Huff, in considerable amounts, for which judgments had been taken which constituted liens upon the land. In the year 1896, Teter was stricken with paralysis which seems to have disabled him for some time and from which he never fully recovered. His purchase of the W. W. Teter land seems to have ante-dated this misfortune by about a year. Sometime afterwards, August 22, 1896, he executed a will by which he gave the home place and some other property to Mrs. Huff, Mertie E. Teter and Floyd Teter. He also gave to Mertie Teter a 26 acre tract of the Zebb's Creek land, and to Thomas Benton Teter five acres of land on Zebb's Creek, in trust for the benefit of his children, explaining that the gift was in addition to advancements he had previously made to said son. The other Zebb's Creek land he devised to his son, W. W. Teter, "as trustee * * * to be used in the maintenance, education and support of the children and heirs of his body, by his beloved wife Mattie V. Teter," and authorized and directed his said son, as such trustee, "to use said lands in whatsoever manner or form he may deem most fit in the main-

tenance, education and support of his said children," and further authorized him to make sale of the lands and convert them into money or bonds, and use the proceeds for the purposes aforesaid. Sometime in the year 1897, he was afflicted with another stroke of paralysis which, for a time, it was thought, would be fatal, but he rallied from that to some extent. On the first day of May, 1901, he executed the deed first above mentioned, whereby he conveyed all his real estate to his wife and the daughter Mertie. Immediately afterwards, the coal in the Zebb's Creek land was conveyed as aforesaid. He died in September, 1901, aged 78 years. At the time of the execution of these deeds, there was a suit in equity pending against him for the subjection of his real estate to the payment of judgment liens, but for what amount, the record does not accurately disclose. During the period of his sickness, he was attended by the son-in-law, Dr. M. M. Huff, who resided as above stated, at Philippi. a place distant from Teter's residence about eighteen miles, although there were other physicians residing in the neighborhood, whose services could have been procured. Dr. Huff, his wife, Mertie Teter and Elizabeth Teter, were the only persons who were with him, to any considerable extent, at his home, from the time at which he received his first stroke of paralysis until he died. The three sons and some of the grand children were there occasionally, as were other persons. The deed of May 1, 1901, instead of being admitted to record, was put into the custody of Dr. Huff, who retained it until after the grantor's death. It was admitted to record January 13, 1902.

The evidence relating to the physical and mental condition of Jesse Teter, from 1896 until the time of the execution of these deeds, seems to fairly establish the following facts: After the first stroke of paralysis, his physical health was very much impaired, and he had difficulty in speaking because the use of his tongue was affected. From that time, he never had his former mental vigor and capacity; his mind seemed to wander so that he was, at times, unable to pursue a given subject in conversation, and occasionally he did things which indicated insanity. The condition of his mind seems not to have been uniform; for the statements

of the witnesses who saw him at different times vary somewhat, not only in expressions of opinion as to his mental condition, but in descriptions of his conduct also. After the second stroke, which occurred in 1897, his condition, both physical and mental, was probably worse than it was between that date and the date of his first stroke; but, after that he still went from home occasionally unattended, and transacted some unimportant business. Witnesses testify to having gone to his home to see him on business, relating to his lands, and to his having been away from home on business.

As to the preparation and execution of the deed of May, 1, 1901, the evidence fairly establishes these facts: Jesse Teter did not participate extensively in the preparation of it. What directions he may have given, or whether he gave any, is not disclosed, except by the evidence of Dr. Huff. It was prepared at his home by Warren B. Kittle, at the request of Dr. Huff. It seems not to have been written in the presence of Teter, but in a room other than the one in which he was, but it was read to him. The only persons present at the time were Teter, his wife, his daughter, Mertie, Dr. Huff, Mrs. Huff and Kittle. From the evidence of Kittle, it is clear that the mother, daughters and son-in-law participated actively in the preparation of it. The directions must have been given by them, for he says about the only thing he remembers having heard Jesse Teter say was, that he wanted to get his debts paid before he died if he could. In view of the preparation of the deed, W. W. Teter was mentioned, and the mother said she would see that he got some of the property, but this discussion was not in the presence of Jesse Teter. The merits of Miss Mertie Teter, and what was due her, were discussed in the same connection, and it was assigned as a reason for the conveyance to her, that she had staid at home, worked hard and taken care of Mr. Teter and his property during his illness. Kittle, the scrivener, was cautioned not to reveal the transaction to other members of the family. The deed was not signed in his presence, but, according to the testimony of Dr. Huff, on the same day. The acknowledgment was taken, three days later, by A. F. Rohrbough, at the request of Dr. Huff. When he first

saw the deed, it bore the signature of Jesse Teter. He made no explanation of the deed to Teter, but the latter acknowledged it.

The circumstances of the preparation of the deed of May 13th are not shown. It does not appear who wrote it. But Gordon B. Teter, a second cousin of Jesse Teter, took the acknowledgment. There seems to have been two deeds prepared for the conveyance of the coal, the first of which was defective in some respect. Gordon Teter went there on two different occasions for the purpose of taking the acknowledgments, the last time on the 18th of June, 1901, and the first time about two weeks earlier. He says that from what he saw of Jesse Teter at the time he took the acknowledgments, he does not think he was able to understand what he was doing. On the second occasion, Dr. Huff handed him the deed, telling him it was all signed up and nothing remained for him to do but to write the certificate of acknowledgment; and after having taken the acknowledgments of Mertie and Elizabeth Teter, he started to the room of Jesse Teter to take his, but was stopped by Dr. Huff who told him to sit down a minute until he went in to see whether he was up yet. Dr. Huff remained in the room so long the notary became restless, and had Miss Teter tell him he was becoming impatient. When he went into Jesse Teter's room, he found him lying in bed and, after explaining the deed to him, asked him if he acknowledged it, but he looked as if he did not understand the notary, and he again explained it, and then Teter nodded his head, and, being asked if he acknowledged his signature to the deed, he said "Yes, that is alright." This witness says that about the first of May, 1901, Jesse Teter was confined to his bed all the time and was under the care of Dr. Huff.

Chief among the specific instances of alleged insane conduct is one related by W. S. Steerman which he fixes about the year 1898. He says Teter came to his place riding a horse, without either bridle or saddle, and, unable to dismount in the usual way, rolled off on a platform, where he lay during the whole afternoon seemingly unconscious. He went to him and tried to talk to him but was unrecognized. Another is given by Thomas Benton Teter, who says, on

one occasion, his father, came to his mill on horseback and rode through the river, when it was so high as to make it dangerous; and that the act was so rash he knows his father would not have done it, if his mind had been in its normal condition. He does not give the date of this incident, but says "My father's mind was affected to such an extent as to incapacitate him for business as early in 1889." He further says that when he went to see his father about the first of May, 1901, his condition was so bad that when he would go into the room and tell him who he was, he would call for the servant girl, Belle.

The evidence for the defendant consists of the depositions of Dr. M. M. Huff, Robert Rinehart, Henry England, and Creed Day; all of whom expressed the opinion that Jesse Teter was mentally competent to transact business and to execute deeds. Rinehart says he went to see him on business, namely, the pasturing of some land on Zebb's Creek, three times in April, May and June, 1901, and could notice no difference in his mental condition through these months. England's testimony relates to conversations had with him in 1899 which, he says, were intelligent, but that the condition of Teter's tongue interfered seriously with his talking. Day says he sheered his sheep for him in the years 1897 to 1901, inclusive, and saw him last in May, 1901. He thinks he was capable of transacting business. Dr. Huff's testimony relates principally to the execution of the deed and the reasons assigned by Jesse Teter for disposing of his real estate in the manner in which he did by the deed of May 1, 1901. He denies all fraud in connection therewith and the exertion of influence in said transactions, and says what he did in that connection was done at the request of Jesse Teter. He says Jesse Teter conveyed the land to his wife and daughter, Mertie, under the belief that it was his duty to do so, in view of their services to him and the faithful care and attention which they had bestowed upon him.

In addition to the evidence of intention to make provision for the children of W. W. Teter, afforded by the will made in 1896, the testimony of witnesses clearly indicates the existence of a strong desire on the part of Jesse Teter to bestow upon them the Zebb's Creek land hereinbefore

mentioned. One witness says he talked to him about the land, soon after the first stroke of paralysis, and regretted that he had not previously conveyed it to W. W. Teter for them, because it was then free from liens, but had since become encumbered so that he could not make the disposition of it, he had intended and desired to make. Other witnesses testify to this desire on his part, as well as to his expressions of appreciation of the kindness shown him by W. W. Teter. He contrasted his conduct with that of his other sons, saying he had done much more for him and that he felt that he ought to do something for his children.

The first inquiry is whether the legal presumption of sanity and mental competency of the grantor has been overcome by the evidence adduced for that purpose. That old age and sickness are not of themselves sufficient has been repeatedly decided by this Court. *Buckey* v. *Buckey*, 38 W. Va. 168; *Delaplain* v. *Grubb*, 44 W. Va. 612; *Eakin* v. *Hawkins*, 52 W. Va. 124. Nor is mental distress sufficient. *Farnsworth* v. *Noffsinger*, 46 W. Va. 410. The witnesses seem to have been unanimous in the opinion that the once strong mental vigor of the grantor had been impaired and broken by his affliction. All seem to admit that from the date of the first attack his mind was never as strong, as it had formerly been, and that his powers of mental concentration and adherence had been weakened to an extent that was noticeable. How far this impression was due to the impediment of speech from which he suffered, as a result of his physical ailment, it would be difficult to tell, but it would be fair and reasonable to say that his peculiarity of expression, no doubt, in some instances, was attributed to mental weakness. Conceding that the evidence established feebleness and weakness of the intellect, these qualities are insufficient to prove incompetency to execute a deed. See the cases above cited. A just criticism upon the evidence offered to show incompetency is that it consists almost wholly of opinions of non-expert witnesses. That this is an unsatisfactory kind of evidence has been repeatedly declared by this Court, as well as by other courts. In *Jarrett* v. *Jarrett*, 11 W. Va. 584, it is said: "The mere *opinions* of witnesses not experts are entitled to little or no regard: unless they are supported by good reasons founded on facts which warrant them: and if the reasons

and facts upon which they are founded are frivolous, the *opinions* of such witnesses are worth but little or nothing." The expressions of opinion in this case are based upon mere observation of the physical condition of the grantor, made upon occasions of casual visits to him, and slight conversations. In a few instances, witnesses have said he did not seem to recognize them or know anything. These may have been occasions on which he was suffering more than was usual, or when his mind was in its worst condition. That he was not always in such a condition of imbecility is evident from the fact that some of the witnesses who testify to his mental incompetency say they visited him on these occasions in reference to business matters and discussed them with him. It is true they say he was not capable of transacting business, but these conclusions were based, to some extent, no doubt, upon their peculiar views and conceptions as to what amounts to sufficient capacity for that purpose. Mental weakness and feebleness do not constitute incapacity in a legal sense. A vast amount of business is transacted by people who do it unskillfully and unsuccessfully, but they are not considered, for that reason, lacking in mental capacity, so as to render their acts void or voidable.

Several witnesses say the mental condition of Teter was very bad in the months of April and May, 1901. As the time given is very near the date of the two deeds, such a condition of mind is matter for serious consideration in reviewing this decree. A grandson says he and his father were there to see him, in the latter part of April or first part of May, for two hours or longer, and that he recognized neither of them. If the testimony of this class were uniform and without variation, it would be impossible to say there was sufficient capacity to execute a deed. But it is not. Lloyd Wilson saw him about the same time, according to his testimony, and, though he says Teter was not, in his opinion, competent at that time, he appears not to have been, by any means, oblivious to his surroundings, for he says he conversed with him, and, in specifying the evidence of mental weakness which he noticed, he says his mind would wander and he seemed to be unable to confine himself to one subject of conversation. John Booth, another strong witness for

the plaintiff, while expressing the opinion of mental incapacity, in April, 1901, admits that he conversed with Teter, and that, though confined to his bed most of the time, he was able to be up part of the time. With him, as with other witnesses, the noticeable defect was inability to pursue a subject of conversation. He says Teter would fail to recognize him at times, but, as to this, he is very general and indefinite and stops short of showing, by a recital of facts and conduct, such incapacity. It amounts to no more than belief that he was occasionally unrecognized. W. A. Streets visited him after the execution of the deed of May 1, 1901, for a few minutes. He says he did not stop twenty minutes in all. Mrs. Huff took him to the bedside of her father and told him who he was. He opened his eyes, but showed no sign of recognition and no desire to converse. The conclusion he gives is based upon a very short and hasty observation. The physical weakness of Teter, together with difficulty in speech may have accounted for his silence, and his silence may have constituted largely the ground of belief on the part of Streets, that the sufferer did not recognize him. But he did respond to the question of his daughter and look up at Streets. Against this kind of testimony we have that of Kittle, who wrote the deed and read it to Teter and who expresses the opinion that he was capable of understanding it. Rohrbough, who took the acknowledgment of that deed, said he asked him if he acknowledged it, and that he responded in the affirmative. His observation was but slight and both sides refrained from taking his opinion as to the mental condition of Teter at that time; but the fact of Teter's response to the inquiry contradicts the theory of absolute unconsciousness, advanced by some of the other witnesses. Gordon B. Teter took his acknowledgment twice in the month of June, 1901, and, while he expresses the opinion that Teter was not capable of executing a deed or transacting business, he shows not only that he was conscious, but that he was able to grasp the matter in hand. He says he did seem, at first, not to understand, but that, upon repeating to him his statement, as to what the paper was and asking him if he acknowledged it, he responded "Yes, that is alright," This evidence opposes the theory of total loss of mental power. The evidence adduced by the plaintiff is

as a whole, unsatisfactory in this, that, while it consists of opinions and belief on the part of the witnesses, it fails to set out or disclose what Jesse Teter did during the four or five years of his affliction. Who attended to his business during that period is not shown. What he did is a far better index to the condition of his mind than what people thought of him. *Ward* v. *Brown*, 53 W. Va. 227, 263; *Beverly* v. *Walden*, 20 Grat. 147; *Mercer* v. *Kelso*, 4 Grat. 106; *Temple* v. *Temple*, 1 H. & M. 476. . He had considerable property, maintained a household which, no doubt, as in other cases, required considerable attention. There seems to be a tacit admission throughout all the testimony that, during the greater part of this time, Jesse Teter attended to his business as best he could. Steerman says he came down and looked after his Zebb's Creek land numerous times within that period. Other witnesses testify to his having been in Belington and elsewhere. One witness says that in the month of November, 1900, he attended religious services at a church some distance from his home, dined after the services with a neighbor, and then rode back home and dismounted from his horse, without assistance. John Booth strongly intimates in his testimony that for a long time he went about his business. He says "I know from the time he was first paralyzed he was out going about different places, at least I have seen him away, but for a while, I could not tell just how long, he was confined to his room mostly. He could cane around some in the house." W. A. Streets says he saw him going along the public road alone in the year 1900.

Our conclusion, from the whole evidence, is, that it establishes nothing more than feebleness and weakness of mind, and fails to make out a case of absolute mental incapacity. According full credibility to all the witnesses, it appears that there were, notwithstanding the weakened condition of mind, lucid intervals during which there was sufficient capacity to appreciate and understand the subject matter of a business transaction, and that the two deeds in question were executed at such times.

This, however, does not dispose of the case. It remains to consider the evidence of undue influence. Upon this inquiry, the extent of mental weakness must be kept in view as a ma-

terial circumstance. Naturally, it would require more evidence to overthrow a deed executed by one whose mental faculties were only slightly impaired, than that of a person laboring under serious impairment of mind. Under the peculiar circumstances of this case, however, this distinction is probably not very important; for the evidence of undue influence is not direct and positive. It consists almost wholly of presumptions arising from relationship and conduct, bearing remotely upon the transactions which this bill seeks to overthrow. That there was persuasion on the part of the beneficiaries of the deed, is a matter of inference only. No witness testifies to any specific act of that kind. The circumstances principally relied upon are, that the grantees in the first deed resided with the grantor, at his home, and were in constant touch and communication with him; that the deeds were prepared by the scriveners at the request of Dr. Huff and the grantees; that the disposition made of the property is different from that which the grantor previously intended to make; and that the whole estate is bestowed upon two members of the family, to the exclusion of all the others. To these circumstances, are added the facts that Dr. Huff's presence was considered necessary on the occasions of the preparation and acknowledgment of the deeds;—that no witness testifies to the time and manner of the signing of the deed, except Dr. Huff; that the deed was concealed until after the death of the grantor; and that Huff was the principal debtor in some of the judgments which constituted liens on the land.

The relationship of the parties, the grant of the whole estate to certain members of the family in exclusion of others, and the circumstances of solicitation on the part of the grantees, if there was any, do not, either singly or collectively, raise any legal presumption of undue influence. *Delaplain* v. *Grubb*, 44 W. Va. 612; 29 Am. & Eng. Ency. Law, pp. 132-133. At most, they are mere circumstances to to be weighed with other evidence in determining the issue. "Moderate solicitation to procure a deed, even when accompanied with tears, does not constitute undue influence." *Doran* v. *McConlogue*, 150 Pa. St. 98. In that case, the grantor was afflicted with paralysis, resulting in an impediment of speech, as in this case. A medical witness testified

that the physical condition of the grantor was one of great feebleness and that, at times, he was not able to talk intelligently. There, as in this case, there was a combination of physical and mental feebleness, difficulty of speech, occasional mental wandering, and positive proof of unequivocal and indisputable solicitation on the part of the grantee; and yet the court upheld the deed, saying the evidence wholly failed to show sufficient ground for overthrowing it. "Though the mere fact that the parent is old and feeble and dependent upon the child is insufficient to cause a court to presume that transactions favorable to the child resulted from undue influence, it is clear that it may be important in connection with other circumstances on the question of undue influence, as where the parent is illiterate, or conveys everything to one child to the exclusion of other children." 29 Am. & Eng. Ency. Law. 133. But the two facts of dependence and exclusion combined raise no legal presumption. They constitute mere evidence. In the case of *Boggess* v. *Boggess*, 127 Mo. 305, a deed was set aside on the ground of mental incompetency, and the evidence tended to establish a condition of things worse than is disclosed by the evidence in this case. There was some conflict in the testimony, perhaps as great as there is here. But the appellate court, in reviewing the action of the trial court, did not regard it as a clear case of either want of capacity or undue influence. In concluding their opinion, the Court said: "Under these circumstances this court must and should defer largely to the trial court. Cases of this character, cases in which the weight to be accorded to the different witnesses must largely determine the issue, evoked from this Court the rule that it would defer in such matters to the trial court. It is peculiarly appropriate that we should do so, unless the record presents some very convincing reason for varying from this usual course."

Nor does the difference between the disposition of the property made by the deed, and that which the grantor had previously intended to make, as shown by the will executed in 1897, combined with the evidence of previous declarations of intention, raise a presumption in law of undue influence. Page on Wills, section 422. The revocation and alteration of wills by testators is of frequent and common occurrence. That a

disposition previously intended is wholly changed and altered amounts to a circumstance, a fact, having direct and important bearing on the question of undue influence, when there is other evidence having a like tendency, is plain; but, if there is a reason for it, or if there are facts and circumstances which the court can see may have been deemed, by the grantor or testator, a sufficient ground for the change, the force and effect of the circumstances is, in reason, seriously broken and impaired, if not wholly overthrown. It appears from the testimony of a witness, that before the will was made, Jesse Teter expressed doubt and fear as to whether it was in his power to do anything for the children of his unfortunate son, because the property had become encumbered by liens. He regretted that he had not conveyed it to them before this occurred. He was conscious of his financial, as well as his physical, condition at the time these deeds were made. At the time of the execution of the deed he expressed to Kittle a desire to provide for the payment of his debts, and that seemed to be the one subject to which his mind went more strongly and directly than any other. It may be that his property was amply sufficient to pay all of his debts and still leave something for all of his children, and that there was no necessity for putting his property into the hands of those members of the family whom he deemed competent to handle it and satisfy the debts and save something out of the estate; but this argues lack of judgment, discretion and business capacity in the ordinary sense of the terms, rather than lack of competency to execute a deed, or that his act resulted from undue influence. Some four years elapsed between the date of the will and the making of the deed, during all of which Jesse Teter was oppressed by the knowledge of his indebtedness and his inability to relieve himself. A suit was pending then for the enforcement of judgment liens against his property. He knew the lack of business capacity on the part of his son, W. W. Teter. That had been demonstrated. For some satisfactory reason he never had intended to leave anything to Thomas Benton Teter. The five acres of land mentioned in the will was devised to him as trustee for the benefit of his children. There is nothing in the evidence which shows that he had any special inclination to favor the other son, Floyd Teter.

As he was not, so far as the evidence shows, in these years of disease and distress, called in as a business adviser, it may be assumed that there was a lack of confidence in his business capacty. In view of this condition of things, and of the hope which Jesse Teter may have entertained of recovery, to a great extent, of his former mental and physical vigor, at the time he made the will in 1897, it is not unreasonable to attribute the alteration of his intention to them, rather than to the exercise of any influence upon him by the grantees. An indebtedness, for the payment of which there is no money at hand, and for the collection of which legal proceedings are pending, is a circumstance which weighs heavily upon persons who are in the full possession of the vigor of manhood, both physical and mental, and often impels them to do things which, to others, may seem unnecessary, wasteful and improvident. Why should it not powerfully operate upon the mind of one who is completely broken in health, utterly hopeless of recovery and fully cognizant of the near approach of death? Its potency, as well as the recognition thereof by courts, is illustrated in *Argo* v. *Coffin*, 142 Ill. 368. If it were a case in which reason and proper motive for the change were wanting, such an alteration as is shown here, would be entitled to great weight.

That the scriveners and officers came at the request of Dr. Huff and Miss Mertie Teter is a circumstance entitled to but slight weight. It is not inconsistent with entire propriety on their part. Dr. Huff says everything was done at the request of Jesse Teter and his statement may be absolutely true. There is no evidence of any protest or hesitancy on the part of the grantor. Not a witness testifies that he was urged or importuned to acknowledge either of the deeds. On the contrary, so far as there is any direct testimony, everything was perfectly voluntary and free. Nor is the fact that Dr. Huff was present, on all these occasions, anything more than a mere circumstance. It is not inconsistent with proper motives and proper conduct. Nor is the fact that the deed was withheld from record and that Mr. Kittle was requested not to mention it to the other members of the family. The person who made this request may have had full and perfect belief in the competency of the grantor and no desire or pur-

pose in the concealment of the deed other than that of avoiding annoyance to the grantor, in his enfeebled condition, as well as unseemly wrangling and controversy, among the members of his family, at his death bed. We do not think the circumstance of liens on the property for debts of Dr. Huff, which were discharged out of the proceeds of the coal, taken with all the others, sufficient to overthow the deed. All this evidence is indirect and remote in its bearing upon the issue raised.

As to mental weakness, the evidence is lighter in weight than in the case of *Buckey* v. *Buckey*, and less satisfactory, in that it is lacking in specification of the facts on which the witnesses base their opinions; and, as to undue influence, it is entirely presumptive. It is a case of presumption of fact against presumption of fact, while the witnesses who were present at the execution and acknowledgment of the deeds, detail facts and circumstances, indicating the presence of sufficient mental capacity and absence of any hesitancy or reluctance on the part of the grantor, and of coercion on the part of those by whom he was surrounded.

Unable to see that the circuit court erred in its finding, we affirm the decree, with costs to the appellees.

Affirmed.

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CHARLESTON

TROUGH *v.* TROUGH.

Submitted February 7, 1906. Decided April 17, 1906.

1. DIVORCE—*Bill—Demurrer.*

A bill for divorce has two grounds or matters for relief. It charges adultery calling for absolute divorce, and desertion calling for decree of separation. The bill does not name a *particeps* in the adultery, or give time, place and circumstance. If the bill be bad therefor, a demurrer, being general, is properly overruled. (p. 465.)

2. SAME—*Enforcement of Payment of Alimony—Striking Out Depositions.*

A court has no power to strike out and disregard depositions filed by a defendant in defence of a suit for divorce, for failure to pay money required of him to enable his wife to prosecute her suit and for temporary alimony, and pass final decree of divorce against him. Such decree is not due process of law. (p. 466.)

3. SAME—*Confessions—Admissibility.*

Confessions of adultery made in the country cannot be given in evidence or considered in a suit for divorce for such offense. (p. 473.)

Appeal from Circuit Court, Braxton County.

Bill by Virginia B. Trough against Richard L. Trough. Decree for plaintiff, and defendant appeals.

Reversed.

HALL BROS., for appellant.

HINES & KELLY, for appellee.

BRANNON, JUDGE:

This is a suit by Virginia B. Trough *versus* Richard L. Trough for a divorce. The bill contains a charge of adultery and also desertion, though the desertion is not for a period to call for an absolute divorce from the bond of matrimony. The special prayer of the bill is for absolute divorce, which was granted, and the defendant appealed.

Demurrer. There is much argumentation upon a demurrer to the bill, based on the claim that the bill does not name the woman with whom the defendant committed adultery, nor does it give time, place and circumstance, and thus wants legal certainty. We do not say whether or no a bill for divorce for this offence should contain the name of the *particeps criminis* or other matter of alleged defect of the bill, because the demurrer is general, and there are two grounds of divorce contained in the bill, one calling for full divorce, *a vinculo matrimonii*, the other a partial divorce, divorce of separation, *a mensa et thoro*. The demurrer does not separate these two causes of suit. It does not aim at the charges of adultery, and being general, it was properly overruled. We again say that where a bill contains two or more matters of suit, one good, one bad, the demurrer must be separate. This has always been law. *Miller* v. *Hare*, 43 W. Va. 647;

Gay v. *Skeen*, 36 *Id.* 582. The bill contains a prayer for divorce absolute and for general relief, and a divorce of mere separation could be granted under the latter prayer. *Vance Shoe Co.* v. *Haught*, 41 W. Va. 276. Therefore, the demurrer was properly disregarded. Here a question arose in my mind. The decree being for absolute divorce for adultery, based thus on that part of the bill said to be defective, can that decree be sustained? Whilst proper to overrule the demurrer, because some relief may be granted, would a decree standing on the bad part of the bill be good on appeal, in view of the rule put in several cases, that where a bill contains some matter proper for relief, and some not good for relief, a general demurrer is not good, and should be overruled, as it should be aimed especially at the bad matter; but where the court gives relief justifiable only on the bad matter, it is reversible error? *Turner* v. *Stuart*, 51 W. Va. 493. But that says bad "matter," meaning the very substance of the facts on which the bill predicates the relief sought, bad matter not calling for any relief by law, not mere defective statement of matter which does call for relief. In this case the bill charges adultery, the alleged defect being in not naming a *particeps* and giving time, place and circumstance —a mere defect of specification. That takes the case out of the rule just referred to. We find no error in disregarding the demurrer. It was not acted on expressly, likely owing to inadvertence; but we must regard it as overruled.

An order was made requiring the defendant to pay $50 for counsel fees and $15 per month for support of the plaintiff and two children, and he failing to pay the court decreed that "'none of the depositions taken by defendant be read or considered on the hearing of this case," and granted a decree of absolute divorce, giving the plaintiff custody of the three children, commanding defendant to surrender to the plaintiff the custody and control of a daughter who was with her father, enjoining forever the defendant from interfering with the plaintiff in the care, custody and control of the children, decreeing that the plaintiff hold a tract of land and personal property consisting of household goods, cows, hogs, chickens and other property claimed by the plaintiff in her bill, and decreeing costs against defendant. The defendant filed an answer denying all the allegations of the charges involved

in the divorce, claiming the land and personal property. The defendant took numerous depositions. Had the court power to thus refuse the defendant the right of defence? For refusal of defence it was, since what avail the answer without proof under it? The case involved the dearest rights of the defendant, wife, marriage rights, children, property, personal character—rights of person and property. What had the payment of this money as temporary alimony to do with the merits of the controversy touching those all important and inestimable rights? Nothing. This action of the court is based on the idea that the defendant in failing to obey the order for payment was in contempt, and that courts have power to punish contempt, and to enforce their orders, necessarily so, and that they can refuse to allow a plaintiff to prosecute a suit for such disobedience, or refuse a party attacked to defend. There is authority for this proposition. 14 Cyc. 795, says that refusal of defence is rarely resorted to, but may be. 1 Ency. Pl. & Prac. 436, says a method to enforce payment "frequently resorted to" is dismissing the plaintiff's bill, or refusing to proceed with the trial, or striking the answer of the defendant from the files and proceeding with the case *ex parte*. These statements are guarded and hesitating. The reason of the matter, the weight of authority, are decidedly against the power to refuse one a defence when attacked. The late work, Nelson on Divorce, in section 861, says: "An order for temporary alimony may be enforced by execution, sequestration, or by proceedings in contempt. But during the suit the court has the power to enforce its orders by declaring the husband in contempt and refusing to proceed with the cause until its order is complied with. In some instances the courts have dismissed his petition for a failure to comply with its orders. It is error to refuse a matter of right, such as a change of venue, until the temporary alimony is paid. It is doubtful if the court should refuse to enter a decree of divorce until the temporary alimony is paid. But in some instances this practice has been approved. In many instances the husband's answer has been stricken out for his disobedience of the orders of the court. But this is now considered against public policy; for it prevents that full investigation into the merits of the controversy which is necessary to protect the interest of the state."

The last expression of Nelson is borne out by *Wass* v *Wass*, 41 W. Va. 126, holding that the state is an implied party to divorce suits and the court must take care that divorces are not granted contrary to law and without good cause. Bishop on Mar., Divorce and Sep., section 1095, says: "Taking away privileges in the cause is sometimes employed for enforcing payment. For example, in justifying circumstances, the court may strike out the defendant's answer, or dismiss the plaintiff's complaint, or refuse to proceed with the trial, unless or until its alimony order is obeyed. Possibly some of the cases under these heads have gone too far. The interests of the public, while not prejudiced by what delays the cause or ends it without a trial, will not permit a hearing with the channels of evidence obstructed. Therefore public policy forbids that a husband's refusal to pay temporary alimony should deprive him of the right to defend the suit." This is so because all law says that public policy looks with aversion on divorces. This principle that the public interest is involved so far that it is deemed a *quasi* party, is fully supported by a note in 30 Am. Dec. 545, and Bishop on Marriage, Divorce and Separation, section 480. Now, you suppress a defence to a divorce suit, and dissolve a marriage on the application of one party, and refuse a defence, and you overturn this public policy. No more effective process to further this result can be conceived. For myself, though not involved in the case, I question the right to dismiss a plaintiff's suit for such contempt, under the nature and structure of our government in America, and especially under our Bill of Rights in our Constitution, Art. 3, section 17, "The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay." And does not this accord the right to defend when attacked "in person property or reputation?" But let us, on this grave question, look at further authority. In *Hovey* v. *Elliot*, 167 U. S. 409, is a long, learned opinion for a unanimous court reviewing the law under English and American cases for more than a century touching the power of courts to punish contempt of a party in failing to pay money under an order of court, arriving at the conclusion that a court cannot for this cause strike out

an answer and take the bill for confessed; that it has not the power to summon a party to defend, and having obtained jurisdiction over him "refuse to allow the party to answer or strike his answer from the files, *suppress the testimony* in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of contempt." The court held the decree void. In *Windsor* v. *Mc Veigh*, 93 U. S. 274, where an answer had been stricken out to a libel of confiscation because the owner of the property was a Confederate, the court said, referring to *Mc Veigh* v. *U. S.*, 11 Wall. 259, referring to an order striking out an answer said: " 'The order in effect denied the respondent a hearing. It is alleged he was in the position of an alien enemy, and could have no *locus standi* in that form. If assailed there, he could defend there. The liability and right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice.' The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has any thing to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be

omitted altogether. It would be like saying to a party, Appear, and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard. In the present case, the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence.

The law is, and always has been, that wherever notice or citation is required, the party cited has the right to appear and be heard; and when the latter is denied, the former is ineffectual for any purpose. The denial to a party in such a case of the right to appear is in legal effect the recall of the citation to him." In *Underwood* v. *McVeigh*, 23 Grat. 409, of a decree given after an answer was stricken out, the court said: "It lies at the very foundation of justice, that every person who is to be affected by an adjudication should have the opportunity of being heard in defence, both in repelling the allegation of fact, and upon the matter of law; and no sentence of any court is entitled to the least respect in any other court, or elsewhere, when it has been pronounced *ex parte* and without the opportunity of defence. An examination of both sides of the question, and deliberation between the claims and allegations of the contending parties, have been deemed essentially necessary to the proper administration of justice by all nations, and in every stage of social existence." In the four cases just cited the decrees were held void as not judicial sentences. The party had no day in court. It is not due process of law under state and federal constitutions. It is condemnation without notice. The party's case has been put out of court. No matter the character of his defence, no matter that he be in contempt, lasting final decree against him, involving in this case his most important rights in life, cannot be entered. It is void for want of due process. It violates that definition of due process of law given by Daniel Webster approved without dissent everywhere. "By the law of the land is most clearly intended the general law, which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial." Such action denies equal protection of the law. The law im-

poses no such heavy penalty for contempt. The right of defence is given to one man and denied to another for no cause involved in the merits. If there is any plain right as to judicial procedure I assert that it is a right to defend where attacked in person, character or property. We recognize in both opinions in *Hebb* v. *County Court* that whilst a court might refuse affirmative action, action in favor of one in contempt, it could not deny one attacked right to defend. 48 W. Va. 279; 49 *Id.* 733. This distinction between plaintiff and defendant will be found in the opinion in *Hovey* v. *Elliot*, *supra*. To support the particular position that a defence cannot be denied to one failing to pay temporary alimony because in contempt I cite *Foley* v. *Foley*, 65 Am. St. R. 147, holding that an answer cannot be stricken out, but the contempt may be punished otherwise; *Gordon* v. *Gordon*, 33 Am. St. R. 294; *Johnson* v. *Superior Court*, holding that one in such contempt cannot be denied process for witnesses; *Bailey* v. *Bailey*, 28 N. W. 443, holding that it would be against public policy to deny a defence for such contempt; *Carson* v. *Carson*, 15 Ga. 405; *McMakin* v. *McMakin*, 68 Mo. App. 57, holding that contempt "does not authorize the striking of answer or refusal to admit evidence for him." *Allen* v. *Allen*, 72 Iowa 502, where the court said, "It will not do to hold that the marriage relation may be dissolved on the ground of defendant's inability to pay a sum for alimony, *or because of* his recusancy." *Dwelly* v. *Dwelly*, 46 Me. 377; *Newhouse* v. *Newhouse*, 14 Ore. 290. Century Digest, vol. 17, section 738, will show few cases to sustain such action. Outside New York scarcely any. Its leading case, *Walker* v. *Walker*, 82 N. Y. 260, seems hesitating, and rests on the old arbitrary practice of English Chancery. But it is not sound English law as the Supreme Court holds in *Hovly* v. *Elliot*, 167 U.S. 409, and as shown in *Gordon* v. *Gordon*, 141 Ill. 163, (33 Am. St. R. 294), citing *Haldine* v. *Eckford*, L. R. 7, 425, where the English court said: "Though the contempt of the defendants had been of the most flagrant kind, yet as what they asked was for the purpose of defending themselves, he had no jurisdiction to refuse the order." Other English cases are there cited. The Illinois court says the New York case is not looked upon with favor or followed. Some cases cited to the reverse do not support that reverse. *Casteel* v. *Casteel*, 38

Ark, 477, holds that the *plaintiff's* suit may be dismissed for refusal to pay wife's counsel fees. *Winter* v. *Superior Court*, 11 Pac. 633, did not refuse defence, but refused to hear the case on the contemnor's motion, refused a *favor* asked by him. *Waters* v. *Waters*, 49 Mo. 385, only holds that a *plaintiff's* suit may be dismissed for failure to pay a wife money to carry on her defence. *Clark* v. *Clark*, 117 N. Y. 622, does not touch the matter.

Another consideration not without force is that we have a statute prescribing how contempts shall be punished. It was passed in 1830 to restrain arbitrary action by courts. Code 1899, chapter 147. I think it contemplates only fine and imprisonment. It curbs or lessens the common law power of courts. *State* v. *Hansford*, 43 W. Va. 773. Just as it was held to be the sole mode of punishment in *Galland case*, 44 Cal. 475.

But it is argued in answer to the point just discussed, that the striking out of the evidence is immaterial, as if all the evidence be considered the same decree would have been made. How do we know what the circuit court would have thought? The evidence was voluminous and flatly contradictory in material respects—contradictory as to the criminal conduct and as to desertion and other matters. Now, first, a decree without a hearing of both sides is not a judicial decision. The case has never been passed on by the circuit court. The party had right to have the judgment of the circuit court on his evidence and cause before this Court can consider the weight of the evidence. Had the decree on evidence on both sides been for the defendant, we could not reverse, unless this Court would think it clearly wrong, because he would have the advantage of that decision, and occupy a different position from that which he now occupies. We cannot, in the first instance, be asked to pass on the evidence. This is an *appeal* court, and is not called on to act until the circuit court has done so. There must be a hearing of the whole case. There has not been. "The Supreme Court will not consider questions not yet acted on by the circuit court." *Kesler* v. *Lapham*, 46 W. Va. 294; *Armstrong* v. *Town*, 23 *Id.* 50. This case, as made up on both sides, has never been decided by the circuit court. But second, the decree is void under the high authorities above given. Can it be, with rea-

son, said that where the whole of a defendant's case has been struck out, consisting of a volume of material evidence, that this Court should perform the function of a court of original jurisdiction, treat the case as if heard on the whole evidence in the court below and review it on the evidence on both sides? When it is just as though the party was not before the court, and was decreed against "without a day in court." Shall we not rather say the case has not been heard—the decree is not binding on the defendant, and remand the case that it may be heard on the evidence? On that evidence we indicate no opinion.

Considerable evidence of admissions in the country by the defendant of criminal conduct was given, which is assailed as incompetent. Can these admissions be considered? As it is deemed by law in the interest of society that marriage should not be dissolved on insufficient grounds, and cannot be dissolved by consent of parties, the common law held such admissions not effectual to sustain a ground for divorce, certainly not alone. 30 Am. Dec. 544; Bishop on Marriage, Divorce and Separation, sections 707, 730. The lowest grade of evidence in weight. Nelson on Divorce, section 781. "While not alone sufficient to warrant a decree, it is admissible in connection with other evidence, unless a statute forbids." 14 Cyc. 682. Does our statute law, Code 1899, ch. 64, section 8, ban such evidence wholly? We think so. The Legislature intended to render it incompetent. "Such suit shall be instituted and conducted as other suits in equity, except that the bill shall not be taken for confessed, and whether the defendant answer or not, the cause shall be heard independently of the admissions of either party, in the pleadings or otherwise." Now, this prohibits the bill from being taken for true on default of the defendant to appear, thus making it different from other suits, and in accordance with the rule in divorce cases requires proof of the grounds of divorce. Next, it forbids a decree though the wrongful act be admitted solemnly in the answer. It must be proven. Now, if an admission or confession in an answer is of no avail, why shall we say that one made in the country is? Can a decree be had thus by indirection when it cannot by an answer of confession? Plain intent and policy would thus be violated. The letter of the law is that the case shall be decided "independ-

ently of the admissions of either party in the pleadings or otherwise." What does this broad word "otherwise" mean? We must give it some effect, as it is sedately added. After saying default, silence, shall not avail, but proof must be made; after saying, with special reference to admissions in the answer, that they shall count nothing, this word is added to say that no admission in the country, outside the pleading, shall count. One case in Virginia on this statute seems to hold otherwise. *Bailey* v. *Bailey*, 21 Grat. 43. I have never been able to see with certainty what it means. Does it mean to say that admissions in letters only are competent? *Cralle* v. *Cralle*, 79 Va. 182, only goes to the effect that admissions may be used to *defeat* a divorce. *Latham* v. *Latham*, 30 Grat. 307, only says that defendant is entitled to a *denial* in his answer—that the act never designed to eliminate that pleading so far as to refuse the benefit of its denial. *Hampton* v. *Hampton*, 87 Va. 148, overrules *Bailey* v. *Bailey* by holding under the statute that "evidence that the defendant admitted the charge (of adultery) and a letter from her purporting to admit it, are inadmissible." If this is not the purpose of this plain statute what is it? Sometimes it operates to defeat justice; but it has a policy which the law has always held as to the marriage state. If wrong, the remedy is with the Legislature. Under another construction a party may obtain a divorce by his or her admission, or greatly aid by it in doing so. It would open the door to collusion between the parties; it would enable one party more easily to divorce himself.

The decree of the 8th day of December, 1903, is reversed and the case remanded for further proceedings.

Reversed.

CHARLESTON

STATE *v.* HAMMONS.

Submitted February 6, 1906. Decided April 17, 1906.

1. INTOXICATING LIQUORS—*Gift to Minor—Evidence.*

H. placed a bottle of whiskey on a table and told F., the father of E., a minor under the age of twenty-one years, to take what he wanted of it; and if he allowed the boy E. to have any of the liquor, that he was welcome to it; the father said he could have it, and the boy took up the liquor and drank of it in the presence of his father. *Held:* No offense under section 16, chapter 32, Code of 1899. (p. 475, 476.)

Error to Circuit Court, Webster County.

Samp Hammons was convicted of giving liquor to minors, and brings error.

Reversed.

E. H. MORTON and W. S. WYSONG, for plaintiff in error.

C. W. MAY, Attorney General, for the State.

BRANNON, JUDGE:

An indictment against Samp Hammons for giving whiskey to a minor was tried by the circuit court of Webster county, upon agreed facts, and a fine was imposed on Hammons. The agreement of facts states "that on the —— day of February, 1904, defendant placed a bottle of whiskey on a table in Webster county, and told Charley Farley, the father of Earley Farley, a miner under the age of twenty-one years to take what he wanted of it, and if he allowed the boy Earley, the minor aforesaid to have any of the liquor that he was *welcome* to it, and that the father said he could have it and the boy took up the liquor and drank of it, in the presence of the father of the minor." Is the defendant guilty on these facts under Code, chapter 32, section 16, providing that "if any person (except a parent to his child or a guardian to his ward) whether he have a state license or not, give to any minor," etc? I inclined to favor affirmance of the judgment; but as the question is close, and other members of the Court are decided in opinion, I shall not attempt to vindicate my doubts. Whose gift was it of the liquor to the minor, Hammons' gift, or that of the boy's father? The state argues that the de-

suit, not an action at law, is not saved by that section. *Dawes* v. *New York, etc.*, 96 Va. 733, is cited to sustain this position. It holds that the word "action" in this section is used in a technical sense, and applies to actions at law only, not to suits in equity. That case concedes that if the new suit is because of loss of papers it is saved, though in equity, though not in other cases. We are not disposed to concur in that decision where the new suit is for other reasons. It seems a technical construction to say that "action" as used in such remedial statute, made to save loss of rights, applies only to suits at common law, saving only where the dismissal is of such suit, not saving where a suit in equity is dismissed, though for like cause. Why the distinction? Where the reason or justice of it? The court regretted to be called on to make the decision. But on scrutiny it will appear that we are not called on to follow, or refuse to follow, that decision. The Virginia statute differs from ours. Our statute, after speaking of dismissals of actions for certain grounds, says: "Or if there be occasion to bring a new suit by reason of the said cause having been dismissed for want of security for costs, or by reason of any other cause, which could not be pleaded in bar of an action." Notice the words "*said* cause." This word "said" refers to the action already spoken of, and I say that if the first suit be a chancery suit, as the second would for the same cause likely be, the second suit would be saved from limitation. And the word "cause" would cover a chancery suit. The Virginia court admits that the word "suit" in the section includes a chancery suit, and as our section contains that word "said," it is to be construed as contemplating a dismissed chancery suit. The Virginia section does not have the word "said" which ours has. We think this consideration would save the new suit, though the former one was in equity. But there is the language "if there be occasion to bring a new suit by reason of said cause having been dismissed for want of security for costs, or by reason of any other cause, which could not be plead in bar of an action," the further time shall be given, "notwithstanding the expiration of the time within which a new *action or suit* must have otherwise been brought." First, this allows a new "suit," which word covers any suit at all, wherever the old suit ended by reason of any cause not barring an action,

which means action or suit. These words are not in the Virginia section. Second, it says notwithstanding the expiration of the time within which "a new action or *suit* must otherwise have been brought." This covers both law action and equity suit, and both the words new "action" and "suit" are in the most material part of the section, that giving further time, showing intent to save any legal proceeding. Why give this remedial section, intended to save rights by giving new suit where a former one was lost for a cause not deciding the merits, so technical a construction, where both words "action" and "suit" are used, and deny one character or suit relief and grant it to another similarly situated?

It is objected that Hevener was not plaintiff in the former suit, did not move it, and therefore the statute does not save him. He was brought into court upon his demand by the executors for litigation of his debt. He acknowledged the suit by filing an answer seeking relief. Now, the equity or liberality of this statute is designed to give extended time for another suit in any case where the first suit involved the same cause of suit, and failing to give relief for any cause not a bar to another suit. No matter why the case failed of relief, unless by voluntary non-suit. *Ketterman* v. *R. Co.*, 48 W. Va. p. 709; *Lawrance* v. *Winifred*, *Id.* 139. It was Hevener's suit as to his claim, as he, at the bidding of the executors, availed himself of their suit for relief, and it does not lie in their mouths to now deny that it was not Hevener's suit. If Hevener had brought a suit while that suit was pending it would have been dismissible under the law of another suit pending. Two suits would not be tolerated. Hogg's Eq. Procedure, section 289; 1 Cyc. 21; 1 Ency. Pl. & Prac. 750; *Foley* v. *Ruley*, 43 W. Va. 513.

And may we not say that by their suit, thereby disabling Hevener from suing, the executors obstructed Hevener in the prosecution of a suit on his demand, within the meaning of Code, chapter 104, section 18? *Reynolds* v. *Gawthrop*, 37 W. Va. 3; *Thompson* v. *Whitaker*, 41 *Id.* 574. This would exclude the time of the pendency of that suit.

The decree is reversed, the demurrer overruled and the cause remanded to the circuit court for further proceedings there to be had.

Reversed.

CHARLESTON

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GRIFFIN v. COAL CO.

Submitted January 18, 1905. Decided November 14, 1905.

1. COAL LANDS—*Deeds—Construction Of.*

Deeds conveying coal with rights of removal should be construed in the same way as other written instruments, and the intention of the parties as manifest by the language used in the deed itself should govern. (p. 488.)

2. COAL LANDS—*Removal of Coal.*

The vendor of land may sell and convey his coal and grant to the vendee the right to enter upon and under said land and to mine, excavate and remove all of the coal purchased and paid for by him, and if the removal of the coal necessarily causes the surface to subside or break the grantor cannot be heard to complain thereof. (p. 484.)

3. SAME—*Reservation in Deed.*

Where a deed conveys the coal under a tract of land, together with the right to enter upon and under said land and to mine, excavate and remove all of it, there is no implied reservation in such an instrument that the grantee must leave enough coal to support the surface in its original position. (p. 484.)

4. CONTRACTS—*Construction.*

It is the duty of the court to construe contracts as they are made by the parties thereto, and to give full force and effect to the language used, when it is clear, plain, simple and unambiguous. (p. 494.)

5. SAME.

It is only where the language of a contract is ambiguous and uncertain and susceptible of more than one construction that a court may under the well established rules of construction interfere to reach a proper construction and make certain that which in itself is uncertain. (p. 494.)

Error to Circuit Court, Harrison County.

Action by Leander Griffin against the Fairmont Coal Company. Judgment for defendant, and plaintiff brings error.

Affirmed.

H. W. HARMER, H. W. WILLIAMS, W. P. HUBBARD, and THOS. P. JACOBS, for plaintiff in error.

JOHN BASSELL, Z. T. VINSON, and EDWARD A. BRANNON, for defendant in error.

MCWHORTER, JUDGE:

This is a writ of error to a judgment of the circuit court of Harrison county rendered in the case of Leander Griffin against Fairmont Coal Company, by the Honorable John W. Mason, then judge of that court. The learned judge in rendering the judgment, filed in the case an opinion in writing, which opinion is copied into one of the briefs filed in the case, and so ably discusses most of the questions arising in the case that I have quoted and adopted as part of the opinion in this case a large part thereof, which accords in the main with the views of the majority of this Court.

"The declaration alleges that the plaintiff on —— day of ——, 1902, was the owner in fee of a certain tract of land, situated in Harrison county, and fully described by metes and bounds, containing about sixty-eight acres, and that underlying the surface of said land there is a vein of coal, which coal (except about three acres) the plaintiff and his grantors on the 1st day of November, 1889, sold and conveyed to Johnson N. Camden, with the following mining rights and privileges:

"The party of the second part and his assigns is to have the right of way through said reservation for a road, air course and drain way, necessary or convenient for the mining and removal of said coal and the coal under coterminous and neighboring lands, together with the right to enter upon and under said land, and to mine, excavate and remove all of said coal and remove upon and under said land the coal from under adjacent, coterminous and neighboring lands, and also the right to enter upon and under the tract of land hereinbefore described, and make all necessary structures, roads, ways, excavations, air shafts, drains, drain ways and openings necessary and convenient for the mining and removal of said coal and the coal from coterminous and neighboring lands to market.

"The declaration further alleges that said coal and mining rights were, by various deeds, conveyed to the Fairmont Coal Company, and that it was, on the —— day of ——, 1902, the owner of said coal and mining rights and privileges; that the said farm or tract of land was owned in fee and used and occupied by the plaintiff on the day and year last aforesaid,

and for a long time prior thereto as a home and farm; that the defendant on the day and year last aforesaid, and prior thereto, mined and removed the coal under the said tract of land, as it had a right to do, leaving, however, large blocks or pillars of coal as a means of support to the overlying surface of said tract of land; that on the —— day of ———, 1902, the defendant, well knowing the premises, by its agents and servants wholly ignoring the right of the plaintiff in that behalf, did wilfully and negligently and without any compensation therefor, or from the damages arising therefrom, mined and removed all of the said blocks or pillars of coal left as aforesaid, and that by reason of the mining or removal of said blocks or pillars of coal, and by reason of the failure of the defendant to provide in any way proper or sufficient support for the overlying surface of said land, the said land, or a large portion thereof, was caused to fall; that the strata of rock overlying said coal and forming a part of the said land were cracked, broken and rent, and that large bodies of it, with the overlying surface fell leaving the said surface with holes and sunken places of such great size and depth as to render it unsafe and of little value for grazing stock or cattle or other farming purposes; that fissures of great depth, and running at great length were made at different places on said land, some of which were near to the dwelling house of plaintiff, passing through that part of said land most valuable for cultivation, and all the water percolating said land above the said coal removed as aforesaid, and all the springs and other courses supplying said farm were diverted, sunken and wholly destroyed.

"There is also a second count in the declaration alleging that defendant through its agents, servants and employes entered said mine under the said premises and wrongfully and wilfully, and without any compensation therefor, did quarry large quantities of valuable building stone and remove the same off of the said premises, which stone were of the value of $200.00.

"The damages claimed in the conclusion of the declaration are $5,000.00.

"The defendant has entered a general demurrer to the declaration and each count.

"The questions arising upon this demurrer are the only ones now before the court.

"No defects in the second count have been suggested by counsel and none are observed by the court, unless it be that it should be averred that the stone removed belonged to the plaintiff. It is possible that by a liberal construction this may be inferred from the general averment of ownership of the land (with exceptions named) contained in the first part of the declaration. It was probably unnecessary to repeat this, in this Court. The demurrer to the second count may therefore be overruled.

"The serious, and in fact, only important question in this case arises upon consideration of the first count. No objections have been pointed out to the form of this count. The objection insisted upon by defendant goes to the right of action. If the defendant's contention be correct the facts stated in the first count do not constitute a cause of action, even if formally pleaded.

"I may add, in passing upon this count, that the declaration should, in addition to the formal commencement and conclusion, contain four parts, to-wit:

"First, A statement of the interests and relative rights of the parties.

"Second, The duties which the defendant owed the plaintiff.

"Third, A breach of duty on the part of the defendant, and,

"Fourth, The damages which resulted to the plaintiff by reason of this breach of duty.

"This declaration does contain a very full statement of the rights of the parties. It avers that the plaintiff owned the land, except the coal and mining rights and privileges named; that this coal and mining rights belonged to the defendant; that plaintiff was in possession using and occupying the land as a home and a farm; that the defendant mined and removed coal under said land as it had the right to do.

"The declaration does not, however, in specific terms, declare what are the duties as claimed by the plaintiff imposed upon the defendant in the premises. The pleader simply avers that the defendant mined and removed coal under the

land, leaving, however, large blocks or pillars of coal as a means of support to the overlying surface, and then alleges that the defendant, by its agents and servants, wholly ignoring the rights of the plaintiff in the behalf did wilfully and negligently, and without any compensation therefor, or for the damages arising therefrom, mine and remove all of the said blocks or pillars of coal, left as aforesaid, and that by reason of the mining and removal of said blocks or pillars of coal, and the failure of defendant to provide in any way proper or sufficient support for the overlying surface the land was caused to fall, etc. Now it will not be contended, I apprehend, that these blocks and pillars of coal did not belong to the defendant, nor that it did not have the right to remove them. All that can be claimed is that if all the coal be removed some sufficient support would have to be provided in its stead. At most, all that could be required of the defendant in this respect would be to furnish a sufficient support for the overlying surface. The declaration is somewhat confusing and uncertain on this point. But if I am correct in the views hereinafter stated, this is immaterial.

"The demurrer is to the whole count, and the court must consider whether or not the count contains any matter which will sustain the action.

"In investigating this subject the character of the transaction should be kept in mind. The plaintiff of his own will sold and conveyed this coal with the express privilege of removing *all of it.* The plaintiff knew when he sold the coal that its removal was contemplated, and consented thereto in language which admits of no doubtful meaning. He also knew that when all the coal should be removed that the overlying surface would sink unless supported. He, by clear and unequivocal language granted a privilege which would necessarily injure him. Why did he grant this privilege? Was the contemplated injury to the surface a part of the consideration of the grant? Or was there an implied contract that compensation would be made for the injury? The deed itself is silent on this subject. Which is the more reasonable theory? Why shall not the defendant have without additional compensation, what the plaintiff has sold and conveyed and agreed it shall have? There being no ambiguity

in this contract why should the court look beyond it for a meaning? Why shall it not be permitted to speak for itself?

"A person who owns the entire estate may sell and convey any part of it. It may be divided horizontally, perpendicularly, or in any manner according to the will of the owner. It is a mere matter of contract. The plaintiff owning the entire estate had the unquestioned right to sell and convey this coal with necessary and convenient mining rights. He did this. Why is not the transaction closed? It certainly is unless there is an additional implied contract or the courts shall extend and add burdens not included in the deed. It is insisted by the plaintiff that the owner of the coal must bear this additional burden because it proposed to remove the coal and that its removal will injure the overlying surface unless supported. Was not this as well understood before the deed was made as afterwards? The plaintiff parted with his title to the coal and granted the right to have it removed upon terms satisfactory to himself. He could easily have required the grantee to furnish support for the surface when the coal should be removed. He owned the natural support of the surface, and sold it and granted the right to remove it, and now asks that before this natural support is removed some other must be provided by the purchasher. It is conceded that the defendant takes under its deed all the coal, and has the right to remove it, that is, it is the owner of all, but it is said it cannot use it (for it is of no possible use to defendant without being removed) without providing some means by which the overlying surface will not be disturbed. On the other hand it is insisted by the defendant that when the plaintiff sold this coal, including the right of removal, that he must have known that its removal would injure the surface unless supported, and that as a man of ordinary prudence and business capacity he protected himself and received ample remuneration for this injury in the purchase price,—that the consideration paid included the value of the coal, and the injury which would be done to the residue of the estate by its removal. Of course the mere fact that a person is the vendee of another does not get him a license to wantonly inure his vendor. It is simply a question whether the injury complained of was anticipated before the conveyance, and taken into consideration and compensated for in the consideration

paid by the purchaser. When the contract is silent upon this point is there any reason why a contract for the sale of minerals should be construed by rules entirely different from the rules of construction applicable to other contracts? It is a rule without any exception (unless the class of contracts under consideration constitutes exceptions) that when a person sells a thing with the right to remove it, or the right to occupy and use it, that he is conclusively presumed, in the absence of a contract to the contrary, to have included in the consideration not only the value of the thing sold, but compensation for the inconvenience and injuries which will necessarily result by its removal or occupation. Many illustrations might be given, such as the sale of growing crops, fruit on the trees; wool on the back of the sheep; trees standing in the forest. Many logs of timber are sold from the standing trees, with the right to cut and remove, and no one would think of asking compensation for the residue of the trees before removing the logs, although the removal of the logs would destroy the trees. In such case, evidently the person selling the logs would take this into consideration when fixing the price of the logs. A farmer may sell that part of his farm most useful to him in furnishing an outlet to the public road, making access to the highway inconvenient. He may sell the portion containing water and seriously lessen the value of the residue, but these things are all presumed to be taken into consideration when the sales are made. The building of a railroad through a piece of land may damage the part not taken. This is always considered when fixing the price of the right of way, whether by private sale or condemnation. Why should a different rule prevail when a contract is for the sale of mineral below the surface?

"The English rule as tersely stated by Baron Parke in the case of *Harris* v. *Ryding*, 5 M. & W. 59, in the following language: 'I do not mean to say that all the coal does not belong to the defendants, but they cannot get it without leaving sufficient support.'

"This rule thus suggested, when carried to its ultimate and logical conclusion means that a sufficient support must be left even if it take all the coal. The Supreme Court of Pennsylvania has frankly stated the rule to be:

"'Where there has been a horizontal division of land the

owner of the subjacent estate, coal or mineral, owes to the superincumbent owner a right of support. This is an absolute right arising out of the ownership of the surface. Good or bad mining in no way affects the responsibility; what the surface owner has a right to demand is sufficient support, even if to that end it be necessary to leave every pound of coal untouched under his land.' *Noonan* v. *Pardee*, 200 Pa. State Rep. 474.

"The reason given by the English courts for the rule under consideration, is that there are two separate estates, one belonging to the owner of the mineral and the other to the owner of the surface; that each has the right to use his own—the owner of the surface to occupy the surface and the owner of the minerals to mine them, but each must so use his property as not to interfere with the other, in accordance with the well recognized maxim of the law. 'Enjoy your own property in such a manner as not to injure that of another person.' Truly this is a just and equitable maxim. It is the Golden Rule of the law. But no one should be permitted to use it as a cloak to cover wrong. Certainly the person who owns the entire estate may sell a part of it, and also a privilege to be exercised in connection with the part sold, which will injure the part retained by him. It would be manifestly unjust for the person who has made a contract of this kind, and received the compensation for the injury, to be permitted to invoke this righteous maxim to aid him in committing a fraud. I understand this maxim can only be properly applied to 'Restrict the enjoyment of property, and to regulate in some measure the conduct of individuals by enforcing compensation for injuries *wrongfully occasioned* by a violation of the principles which it involves, a principle which is obviously based in justice, and essential to the peace, order and well being of the community.' Broome on Legal Maxims, 289. I do not understand that it applies to injuries done to property by authority of the owner for a compensation. The compensation for the injury is a proper matter of contract between the parties, and there is no reason why the injured party may not receive satisfaction by contract as well as by the verdict of a jury. In order to avoid the force of this reasoning it has been held that in such conveyances all the estate is not granted with the minerals—that

prima facia enough is reserved by implication for support of the overlying surface. Baron Parke admits that the title to minerals passes by the deed, but says that grantee cannot take them without providing support for the surface, but Chief Justice Campbell lays down the rule in *Humphreys* v. *Brogden*, 12 Q. B. 730, that the presumption is, in the absence of express words waiving or qualifying the right that the surface must be protected with the natural support which it possessed before the demise. Which means, I take it, that enough of the minerals are reserved for that purpose. I cannot assent to this proposition. This rule, taken in connection with the other one propounded by the same court, that sufficient of the minerals must be left, no matter how much, to support the surface, involves the absurd proposition that a person who owns the entire estate may convey without limitation or qualification all the coal, with the right to remove it, and yet the deed contain the presumption that a portion of the coal is reserved, and further, that the coal reserved may amount to the whole of the estate granted that the purchaser in fact takes nothing. It seems to me that this is a *reductio ad absurdum*. Why not assume, at least *prima facia*, that the deed is correct; that it means just what it says when there is no ambiguity? When a deed on its face by plain and apt words conveys all the coal, why should the courts say there is an implied reservation of part or perhaps of all of it, and that less than the whole, or in some cases nothing, is conveyed? The owner of property about to part with the title is at liberty to prescribe the terms and conditions on which he will do it. The intention of the parties is presumed to be expressed by the language of the deed itself. If no reservations or exceptions are found in the deed none should be presumed. The deed as the witness to the contract between the parties should speak the truth, the whole truth and nothing but the truth.

"The rule for the construction of deeds prescribed by our statute is:

" 'Every such deed conveying lands, shall, unless an exception be made therein, be construed to include all the estate, right, title and interest, whatever, both at law and in equity of the grantor in such lands.' Code, chapter 72, section 2.

"Again, some of the courts uphold the rule on the principles applied in the cases prohibiting one owner of land from making an excavation so near the adjoining lands of another that the soil of the latter breaks away. This illustration is not an apt one. Ordinarily, in the cases where lateral support is required there are no contractual relations between the parties. Even when they sustain the relation of vendor and vendee toward each other the excavations are not contemplated by the nature of the transaction. But in the sale of coal the removal is not only contemplated but expressly authorized. Lord Campbell in delivering the opinion in the case of *Humphreys* v. *Brogdon*, 12 Q. B. 739, cites as authority supporting his opinion, the case when a person purchases one story of a building containing two or more stories. He says:

" 'Where a house is divided into different floors or stories, each floor belonging to a different owner, which frequently happens in the city of Edinburg, the proprietor of the ground floor is bound merely by the nature and condition of his property without any servitude, not only to bear the weight of the upper story, but to repair his own property that it may be capable of bearing that weight. The proprietor of the ground story is obliged to uphold for the support of the upper, and the owner of the upper must uphold that as a roof or cover to the lower.' 32 Am. Rep. 112. The conclusion reached by the learned chief justice is erroneous because his premises are wrong. He assumes that the cases are similar. A moment's reflection will convince any one that they are dissimilar in a very material point. The story of the building, whether the lower or top one, is sold and bought to be used in place. This is apparent from the very nature of the transaction; but in the case of the sale of coal the opposite is true. It cannot be used in place. In the case at bar nothing is left to presumptions. The deed expressly grants the right to remove it.

"It is conceded that the grantor might waive the right to support of the surface, and where that is done there can be no recovery for injuries caused by the subsidence of the soil. It is insisted by the defendant that the language used in the deed in controversy is equivalent to a waiver. It is true that in this deed there is not only a grant of the coal, but also an

express grant of the right to remove '*all of it.*' It may be that this grant of the right of removal adds nothing to the legal effect of the deed except to make the general grant more emphatic. Taking the entire granting clause of the deed together there can be no doubt as to the intention of the parties. I rest the case on the fact that plaintiff by his deed conveyed the coal with the right to remove all of it. There is no limitation to or qualification of the estate granted, nor is there anything in the deed to indicate an intention to limit or restrict the right to remove the coal. Then, the plaintiff was the owner of the entire estate, and when parting with the title to the whole or any part of it could do so on terms and conditions to be agreed to by him. He was fully aware of the injury that might naturally and reasonably be expected to result from the removal of the coal, and yet he expressly authorized its removal. Under these circumstances it is proper to assume that the price paid for the coal and the mining rights granted, was fixed with reference to the nature, extent and effects of the rights conveyed. There is no ambiguity in the terms of the grant, and there is no reason to believe that the grantor did not fully understand them, or what was the effect of the deed, deliberately made by him.

"It may be that it was an improvident contract; but courts cannot make contracts for people; they can only construe the contract made by the parties. I cannot construe this contract to mean that the parties intended that the plaintiff should sell his coal, receive the pay for it, and keep both the coal and the money. This would certainly be a perversion of the homely old proverb that you 'Cannot eat your cake and keep it.' Nor can I reach the conclusion by any fair construction of the language employed by parties in the deed that any additional burden was to be placed on the grantee before enjoying his property than those named in the deed. This would be inserting in the deed new conditions. I am clearly of opinion that the courts hereinbefore referred to have wholly disregarded the well established rules of construction applied in construing all other contracts. It is a rule as I understand the law of universal application, that where there is no ambiguity in the language of a deed it should be construed according to its legal effect to be gathered from its face. 5 Grat. 141.

"But if these cases are to be followed a different rule is to prevail in construing deeds conveying minerals. We must according to these decisions, presume that a part of the thing conveyed was intended to be reserved, notwithstanding the conveyance is without qualification or limitation, or any expressions in any part of the deed indicating that the parties intended anything but an absolute grant.

"I wish to be clearly understood, and hence at the risk of becoming tiresome by unnecessary repetitions will add that I do not mean to intimate that the person who owns the entire estate and sells the subjacent strata of any kind should give away the surface or waive damages thereto without compensation. What I mean is that all such questions should be settled at the time these strata are sold, and that courts should presume they were so settled unless a contrary intention appears on the face of the deed. The removal of substrata is a matter of too much importance, and effects too largely the residue of the estate, not to enter into the contract or to be left to doubtful and uncertain implications of law. Of course the rule of law which applies to coal must apply to fire-clay, potter's clay, iron ore and all subjacent minerals. The thing sold and to be removed may be of very small value as compared with the overlying surface, and as a consequence the owner would want to sell only so much as could be removed or taken away without disturbing the surface, on the other hand, the thing sold may be of so much more value than the surface that the owner would be willing to sell and authorize the removal of all without reference to the soil. He might not wish to retain coal which he could sell at $100.00 per acre to support surface worth $5.00 per acre.

"Many examples may be found; coal removed from the same opening, and when the coal is of the same value, yet there may be immense difference in the value of the overlying surface. Then, again, in many places are found several veins of coal overlying each other; when the owner of all of them sells the lower vein and retains the others he is interested not only in protecting the soil but the intervening strata as well. Many other illustrations might be given but these are sufficient to illustrate my idea and to show that in all sales of minerals the question of injury to the lands not con-

veyed is of so much importance that courts should not assume that it was not considered and made part of the consideration of the deed. In mining coal perhaps from 35 to 50 per cent. of the entire vein would have to be left in the land by way of ribs and pillars, unused, to form surface support. This would depend to some extent upon the depth of the coal below the surface and the nature and condition of the intervening rocks if any. These pillars and ribs would be of no possible use to any one except to the owner of the overlying surface. Now whether all this coal is to be bought and removed, or only a part of it, and the residue to be kept by the owner for the benefit of his other estate, are proper subjects of contract, and the contract must be expressed in the deed. When the deed shows clearly on its face that all the coal was sold, and especially where there is a clause giving the right to remove all of it, I cannot think the courts have any right to say that the deed does not *prima facia* mean what it says. This would be to construe out of the deed, after it was made and delivered from 35 to 50 per cent. of what clearly passes by its express terms. For it is a matter of common information, known to all who have paid any attention to mining that in coal mines the coal will have to remain in place as a support, or the surface be permitted to subside. Permanent artificial support would cost more than the coal is worth in most cases. So it is a question of leaving something like one-half the coal in the mine or removing all and permitting the overlying surface to adjust itself to a new bed. And this, I again repeat, should be left for the parties to determine by their contract. If the owner of the coal wishes to keep half of it as a support for the surface he has a perfect right to do so, and if he wishes to sell all and permit all to be removed he may also do that. When he has made his contract in accordance with his own will and reduced it to writing the courts may declare the legal effect of the writing but cannot change it."

In 9 Cyc. 577, it is said: "The law furnishes certain rules for the construction of written contracts for the purpose of ascertaining from the language the manner and extent to which the parties intended to be bound and that rule ought to be applied with consistency and uniformity; and it is not proper for a court to vary, change or withhold their applica-

tion;" citing *Johnson County* v. *Wood*, 84 Mo. 489; *Heady* v. *Building Association*, 26 S. W. 468 (Tex.) It is further said on the same page, 9 Cyc.: "The first and main rule of construction is that the intent of the parties as expressed in the words they have used must govern. Greater regard should be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent. If the words clearly show the intention there is no need for applying any technical rules of construction, for where there is no doubt there is no room for construction." And cases there cited. And same volume 587, "It is not the province of a court to change the terms of a contract which has been entered into, even though it may be a harsh and unreasonable one. Nor will the dictates of equity be followed if by doing so the terms of a contract are ignored; for the folly or wisdom of a contract is not for the court to pass upon. Its terms, however onerous they may be, must be enforced if such is the clear meaning of the language used and intention of the parties using that language." Citing *Larguier* v. *White*, 29 La. Ann. 156, where it is held: "The stipulations made by the parties in their contract are the law to them, and to their assigns under the contracts, except when such stipulations are in contravention of the public law or good morals." The deed set out in plaintiff's declaration gives to the grantee and his assigns, in as clear and distinct terms as the English language could well express, the "Right to enter upon and under said land and to mine, excavate and remove all said coal." In *Carrington* v. *Goddin*, 13 Grat. 587, it is held: "If it is doubtful on the face of the deed whether one or both of the parcels were intended to be conveyed, the deed will be construed most strictly against the grantor and so as to give it effect, rather than that it should be void for uncertainty." And in *Allemong* v. *Gray*, 92 Va. 216, it is held that where: "If the words and provisions are doubtful they are to be taken most strictly against the grantor." And in *Lagorio* v. *Dozier*, 91 Va. 492, it is held: "A deed should be so construed as to give effect to the true intent of the parties, as expressed in the deed, considered in all its parts, and construing the language used according to its common and usual acceptation." And in *Gibboney* v. *Fitzsimmons*, 45 W. Va. 334, (syl. pt. 1), "The legitimate

purpose of all construction of instruments in writing is to ascertain the intention of the party or parties making the same and when this is determined effect will be given thereto unless to do so will violate some established rule of property." And in *Hurst* v. *Hurst*, 7 W. Va. 341, it is held that parol evidence as to the actions or declarations of the parties at the time of the execution of the deed or afterwards are inadmissible and incompetent to enlarge, restrain, explain or alter the intention of the grantor or grantee, "As expressed in the deed or to vary the legal effect thereof as clearly manifested by the deed itself." *McDougal* v. *Musgrave*, 46 W. Va. 509; and in *Long* v. *Perine*, 41 W. Va. 314, (syl. pt. 2), it is held: "Where there is no ambiguity in a written contract, oral evidence is not admissible to explain it, as it speaks for itself." And in 9 Cyc. 590, treating of the construction of a deed by the parties thereto being adopted by the court in giving effect to its provisions, says: "The rule above stated does not apply, however, where the meaning of the terms used is clear. In such a case the fact that the parties have themselves, by their subsequent conduct or otherwise, placed an erroneous construction upon them will not prevent the court from giving the true construction." And cases there cited.

We agree with the conclusion reached by the learned judge in what we have above quoted from his opinion, and with much of the reasoning upon which it is based. We do not, however, fully agree with all that is said in his opinion. We do not agree that the additional grant contained in the deed of the right to enter upon and under said land and to mine, excavate and remove all of said coal adds nothing to the legal effect of the deed, or that it is merely emphasis to the general grant, as intimated by him. It seems to us that this additional grant has a distinct and material office to perform and that force and effect must be given thereto in the construction of this deed. In the construction of a deed, effect must be given to every part and every word therein contained if possible to do so.

We in no sense question the doctrine or right of subjacent support in a case where the surface and subjacent estate are owned by different persons and the right of support has in no way been parted with or waived by the surface owner.

In case at bar there is no ambiguity in the language of the deed, and taking the words used in their common acceptation they have but one meaning, and therefore there is no room for construction. The reservation of the three acres in the deed is in such language as to emphasize the intention of the parties that *all* and not *a part* only of the coal should be removed from the land not so reserved, as it plainly provides for the protection of the three acres, only granting "The right of way through said reservation for a road, air course and drainway, necessary or convenient for the mining and removal of said coal, and the coal under coterminous and neighboring lands."

It is contended by counsel for plaintiff in error that it is a question of public policy and says that "West Virginia is not altogether silent on this question." Citing section 7, chapter 79, Code, which provides: "No owner or tenant of any land containing coal shall open, or sink, or dig, excavate or work in any coal mine or shaft, on such land, within five feet of the line dividing said land from that of another person or persons, without the consent, in writing, of every person interested in, or having title to, such adjoining lands, in possession, reversion or remainder, or of the guardians of any such persons as may be infants;" with a penalty attached for any violation thereof, to be recovered by the party injured. This is a provision for the protection of lateral support of coterminous owners between whom there are no contractual relations and the statute cited recognizes on its face that it is a matter of contract between the parties interested; but, the law makers did not presume to legislate concerning subjacent support, recognizing the well established fact that the owner of the whole estate in fee, has unlimited control thereof, from the center of the earth to the surface, and if he could himself by mining or other means cause the subsidence of the whole or any part of the surface not within five feet of his exterior line he could by contract grant that right to another, and this is a fact conceded, as well in the English and American States cases cited, as by counsel for plaintiff in error.

It appears from the record that the plaintiff waived his second count and declined to amend the first count, the demurrer to which was sustained by the court because "It seeks to recover damages from the defendant for having done

what the deed upon which the action is based, clearly and unequivocally authorized the defendant to do."

The reasons for our decision in this case are more elaborately set out in an opinion filed by JUDGE COX, which appears below, and in which all the members of the Court concur, except JUDGE POFFENBARGER, who dissents from the decision.

There is no error in the judgment and the same is affirmed.

Affirmed.

COX, JUDGE, (*concurring*:)

I concur in the conclusion reached by this Court in this case. I have no quarrel with the doctrine or right of subjacent support, when it has not been parted with, applicable where the surface and subjacent estate in the same land are owned by different persons. I do not condemn or question what I deem the best considered cases and text-books expounding this doctrine. Owing to these facts, and to the very great importance of this case, I have concluded to prepare this opinion.

This case is on a writ of error to the judgment of the circuit court, sustaining a demurrer to the declaration and dismissing the action. It appears from the averments of the declaration, which for the purposes of demurrer must be taken as true, that plaintiff, Griffin, being the owner in fee of 68.89 acres of land in Harrison county underlaid with coal, sold and conveyed the coal (except 3 acres thereof) to Camden, with the following mining rights and privileges: "The party of the second part and his assigns is to have the right of way through said reservation for a road, air-course and drain way necessary or convenient for the mining and removal of said coal and the coal under coterminous and neighboring lands, together with the right to enter upon and under said land and to mine, excavate and remove, all of said coal and remove upon and under said land the coal from under adjacent, co-terminous and neighboring lands, and also the right to enter upon and under the tract of land hereinbefore described, and make all necessary structures, roads, ways, excavations, air-shafts, drains, drain-ways and openings necessary or convenient for the mining and removal of

said coal, and the coal from co-terminous and neighboring lands, to market."

The defendant company became the owner of said coal and mining rights and privileges conveyed to Camden. The defendant, having removed a part of said coal, leaving blocks or pillars thereof, afterwards removed the blocks or pillars, completing the removal of all the coal without leaving support for the surface, thus causing subsidence of the surface, as plaintiff avers, to his injury and damage.

Plaintiff brings his action of trespass on the case for damages, not relying upon any express covenant or provision of the deed of conveyance, which constitutes the contract between the parties, but relying upon what is termed the doctrine or right of subjacent support. The only act complained of is the act of removing all the coal conveyed without leaving support. The manner of the removal is not complained of; and no negligence in the manner of removal is averred. The act of removal itself, and not the manner of doing the act, is averred to be negligent. This being the case, there is for determination the single question: Was the removal of all the coal conveyed without leaving support in violation of plaintiff's right?

This leads us to a consideration of the doctrine or right of subjacent support. We are cited to no previous decisions in point in this State, or in the state of Virginia before the formation of this State. We are cited to many decisions and text-books, both English and American, which are not said to be binding authority upon this Court, but which may be termed persuasive reasoning. They appeal to us and should govern us so far, and only so far, as they appear to us to be founded upon correct principles. We are seeking the right—the truth—and should accept it wherever found.

In this investigation, we turn naturally to England, which I think may be termed the parent of the doctrine of subjacent support. The first cases were decided there.

No case or text-book, either English or American, will be found which rests this doctrine or right of subjacent support upon more than two grounds, or, rather, which holds that

the doctrine or right is composed of more than two ingredient propositions. They are: First, a presumptive or implied reservation to the surface owner of sufficient of the subjacent strata or estate to support the surface *modo et forma*. Second, the principle of law expressed in the Latin maxim: *Sic utere tuo ut alienum non laedas*—liberally construed, "So use your own property as not to injure the property of another." Many authorities rest the whole doctrine upon the last proposition only. The principle contained in the first proposition, when applied to a case where the fee owner has granted the surface and reserved the underlying strata or estate, would necessitate an implied additional grant of so much of the subjacent strata or estate as was necessary to support the surface; but we are not dealing with that case here.

The first proposition was announced by Lord Campbell in *Humphreys* v. *Brogden*, 12 Q. B. 739, decided in 1850, in which he used this language: "If the surface and the minerals are vested in different owners without any deeds appearing to regulate their respective rights, we see no difficulty in presuming that the severance took place in a manner which would confer upon the owner of the surface a right to the support of the minerals. If the owner of the entirety is supposed to have alienated the surface, reserving the minerals, he cannot be presumed to have reserved to himself, in derogation of his grant, the power of removing all of the minerals without leaving a support for the surface; and if he is supposed to have alienated the minerals, reserving the surface, he cannot be presumed to have parted with the right to that support for the surface by the minerals which it had ever before enjoyed."

This was not the first case in England upon the subject of subjacent support, as thought by some. Lord Campbell in that case also recognized the second proposition above mentioned, but reached his conclusion by analogy to the severance of the ownership of the different stories of a house, quoting Erskine's Inst. as follows: "Where a house is divided into different floors or stories, each floor belonging to a different owner, which frequently happens in the city of Edinburgh, the proprietor of the ground floor is bound, by the nature and condition of his property, without any servitude,

not only to bear the weight of the upper story, but to repair his own property, that it may be capable of bearing the weight. The proprietor of the ground story is obliged to uphold it for the support of the upper, and the owner of the upper must uphold that as a roof or cover to the lower."

Lord Campbell in that case was very guarded in his holding that the law there laid down only applied where the surface belonged to one man and the minerals to another, and no evidence of title appeared to regulate or qualify their rights of enjoyment. The last clause of the opinion contains the following language: "I need hardly say that we do not mean to lay down any rule applicable to a case where the *prima facie* rights and liabilities of the owner of the surface of the land and of the subjacent strata are varied by the production of title deeds, or by other evidence."

The earlier English case of *Harris* v. *Ryding*, 5 M. & W. Rep. 59, decided in 1839, held that the mining rights in the deed in question applied to acts to be done upon the surface of the land, and did not enlarge the rights of the owner of the minerals, under the ground, beyond what they were without the mining rights. Baron Park there reached his conclusion in this language: "I do not mean to say that all the coal does not belong to the defendants, but that they cannot get it without leaving sufficient support."

Some English and American cases have followed the two English cases cited, resting their decisions, at least in part, upon the theory of a presumptive or implied reservation of so much of the subjacent strata or estate as is necessary to support the surface. The case of *Noonan* v. *Pardee*, 200 Pa. 474, carried that theory to its logical conclusion by holding: "What the surface owner has a right to demand is sufficient support, even if to that end it be necessary to leave every pound of coal untouched under his land."

In Blanchard and Weeks' Note to the case of *Jones* v. *Wagner*, in Leading Cases on Mines, etc., page 617, it is said: "There is a *prima facie* inference at common law, upon every demise of minerals or other subjacent strata, where the surface is retained by the lessor, that the lessor is

demising them in such a manner as is consistent with the retention by himself of his own right to support. In the absence of express words showing clearly that he has waived or qualified his right, the presumption is that what he retains is to be enjoyed by him *modo et forma*, and with the natural support which it possessed before the demise."

The theory of implied reservation or implied grant has been couched in different language in different cases. Some cases have said that the subjacent estate owes a servitude to the super-incumbent surface. Others have said that the surface owner is entitled to an easement. Others have called the right of subjacent support *ex jure naturae;* and still others have said that the right is a part of the surface, and as such may not pass except by express words. In whatever language the decisions referred to may be couched, in the last analysis they rest upon the authority of *Humphreys* v. *Brogden*, holding that there is a presumptive or implied reservation or an implied grant.

The theory of an implied reservation is earnestly relied on by the learned attorneys for the plaintiff, in their original brief. I quote therefrom as follows: "In a grant like the one at bar, a reserve of the right of surface support is implied." This proposition of the early English cases, of an implied reservation in the face of an express grant, has been much questioned and criticised in England, and, it seems to me, with great reason. I do not think that, in a case where the owner of the fee granted or conveyed the underlying strata or estate, the theory of an implied reservation, amounting if necessary to the whole of the thing granted, could ever have been maintained upon sound reason. It seems to me that the first part of the statement above quoted from Lord Campbell in *Humphreys* v. *Brogden*, viz., that the grantor in case of the reservation of the minerals cannot be presumed to have reserved to himself, in derogation of his grant, the power of removing all the minerals without leaving a support for the surface, furnishes a conclusive reason for overthrowing the second part of his statement quoted, viz., that in case the owner of the entirety is supposed to have alienated the minerals, reserving the surface, he cannot be presumed to have parted with the right to

that support for the surface by the minerals which it had ever before enjoyed. The latter part of the statement necessarily implies a reservation in derogation of the grant —the very thing condemned in the first part of the statement.

I cannot see how, against every rule of construction, where a deed has been made by the owner of the fee, granting in express terms all the subjacent strata or estate, that the right of subjacent support may be based upon the ground that there is a presumptive or implied reservation by such a deed, in which there is no express limitation, reservation or exception, and in derogation of the express terms of the grant, of so much of the subjacent strata or estate, to the extent of all if necessary, to support the overlying surface. Such a proposition seems to me to be contrary to all principles of law. I am not, however, saying that the doctrine or right of subjacent support does not exist where it has not been parted with; but I do say that I cannot assent to the proposition that it emanates from a presumptive or implied reservation of so much of the estate granted as is necessary to support the surface.

An inconsistency running through most of the cases holding to the theory of an implied reservation is they concede that after the grant the grantee is the owner of the thing granted.

In the later English case of *Eadon* v. *Jeffcock*, L. R. 7 Ex. 379, decided in 1872, the provisions of a lease of a bed of coal were involved; and the Court held that the intention of the parties was that all the coal should be removed, other than certain pillars specified by the terms of the lease, and that the lessees were not otherwise liable for failure to leave support for the surface. There is no difference in principle between a lease and a deed of conveyance. *Davis* v. *Treharne*, 6 App. Cas. 460. I do not find that this case of *Eadon* v. *Jeffcock* has been overruled. On the contrary, it is cited as late as 1902, as one of the leading English cases. It is true that in the case of *Davis* v. *Treharne*, *supra*, Lord Blackburn alone, of the three Lords, delivering opinions, including the Lord Chancellor, said: "I cannot agree with what seems to have been said by Baron Cleasby in the case of *Eadon* v. *Jeffcock*." The other Lords delivering opinions

did not question that case; and it was not there overruled. In the case of *Eadon* v. *Jeffcock*, Baron Cleasby said in part: "It appears to us that, outside of this contract, there is no reservation of any right to support, whatever the exact nature of that right may be, but that we must look at the contract itself, and by a proper construction of it, having regard of course, as in all cases, to the subject matter, arrive at the extent to which the owner authorizes the minerals to be removed." He also quotes from Lord Wensleydale in *Rowbotham* v. *Wilson*, 8 H. L. C. 359, as follows: "Whether the right to support given by the land below to the land of the owner of the surface, when the strata belong to different persons, properly is to be called an easement, as it is by Mr. Gale in his excellent Treatise on Easements, 'a natural easement,' or, whether the owner of the surface has merely a right to enjoy his own land in its natural state and condition with a right of action against the owner of the land adjoining or subjacent when the act of his neighbor does him an injury, are questions immaterial to the decision of this case, though the last proposition appears to be fully established by the judgment of the Court of Exchequer Chamber in *Bonomi* v. *Backhouse*," 9 H. L. C. 503.

Baron Bramwell, delivering an opinion in the case of *Eadon* v. *Jeffcock*, said, in part: "In this case the defendants have a lease of a seam of coal. It may not appear of much consequence by what name their interest is called, but the word lease may in such cases have helped to a particular conclusion. For by that word we commonly understand a temporary estate granted in something which, at the end of the term, is to be restored to the lessor in the condition in which it was delivered to the lessee, fair wear and tear excepted, as in a lease of land, house or a moveable chattel. But that is not the intention of a lease of a seam of coal. That is more a sale of the coal, or grant of a right to take and remove it within a certain time, and it is not to be restored at the end of that time to the grantor. Treat it as a sale of the coal, provided the vendee get it all within a certain time; and why should the grantor be at liberty to say: 'Though in terms I sold the whole of it, yet by implication I reserved as much as was necessary to support the surface in its natural condition:' Why should not the argument be

good, 'If you meant that exception you should have said so in words.' Suppose a sale of brick, earth or gravel by metes and bounds, and suppose the vendee took it all, and suppose then the soil of the vendor outside the boundary crumbled in for want of lateral support would the vendee be liable to a claim in respect thereof by his vendor, and, if he would, why? With great respect, such a dealing with a seam of coal is more like selling the materials of an intermediate floor than letting or selling the floor. Suppose a man with a three story house sold the materials of the second floor, would he have a right to say, 'But you must leave enough to support my third story or you must prop it up?' It is true a lessee of a mine may take all the coal and artificially prop the surface; but, practically, this is impossible, owing to the expense; and the same argument applies, viz., why did not the grantor stipulate for it? It may be said that if this argument is true of a lease or grant of coal, to be taken in a certain time, it would be equally so of a grant to be taken whenever the grantee thought fit; if so, of all cases where the ownership of mines and surface was severed; and that the authorities are overwhelming the other way. But, in the first place, the argument is not so strongly applicable where the grant allows the grantee to take at any time, because the grantor may well allow his land to be let down provided it is to be down within a certain time, where he would object if he could not tell for all futurity when it might happen. In the next place, where the terms of the severance are not known, but only that there is a severance, then it may as well be presumed one way as the other. That is a case of ownership, not contract, as this is. Here the terms of the contract that gives the right to take the coal are known, and the question is, why does not the general principle apply viz., look at what is said in the deed, and add nothing except from a necessity for doing so." Yet Baron Bramwell felt bound by the previous decisions of his own country, and doubted as to his decision.

It is obvious that the English Courts are no longer in sympathy with the theory of presumptive or implied reservation of so much of the thing granted as is necessary for support, as a basis for the right of support. *Rowbotham* v. *Wilson*, *supra*; *Bonomi* v. *Backhouse*, *supra*. Our statute,

section 2, chapter 72, Code, provides: "Every such deed, conveying lands, shall, unless an exception be made therein, be construed to include all the estate, right, title and interest whatever, both at law and in equity, of the grantor, in or to such lands."

Shall we still say that there is an implied reservation, in derogation of the express grant? The answer is apparent.

What we have said does not dispose of the whole doctrine of subjacent support. What is the doctrine or right in this State, and upon what does it rest? It rests upon, and consists solely of, the second proposition above stated—the principle of law, *Sic utere tuo ut alienum non laedas.* This rule of law expresses all that there is of the doctrine. This position seems to be fully recognized by plaintiff's petition for a rehearing.

It may be asked, what is the difference upon what ground the doctrine or right of subjacent support rests, so that it exists. The reply is that the difference is not so much in the existence as in the manner in which it may be parted with by the surface owner. If the right of support is a reservation of the subjacent estate, or a servitude upon it, or an easement in favor of the surface owner, or a part of the surface estate, there is more show of reason in saying that the right of support may not be parted with by implication or without express words, than there is when the right is considered to consist only of a rule of law commanding that you shall not use your own so as to injure that of another.

This rule of law relates to the use and enjoyment of property, and not to the ownership of property. As a rule of law it is negative in its application, forbidding the use so as to injure that of another. It is not a servitude when applied between the owner of the surface and the owner of the subjacent strata of land, in the strict sense of that term, any more than it is a servitude upon all property. Likewise, it is not, strictly speaking, an easement in favor of one owner of property against another. It is no more a part of the surface than of the subjacent estate in land, although applicable to both. It has no more force when applied between the different owners of the surface and subjacent estates in land,

than when applied between the different owners of property everywhere and of all kinds. As a rule of law, it must be always the same—constant, invariable, and immutable.

By the side of this principle of law, and to be applied in harmony with it, there is another which must be considered. It is the proprietary right of the owner of property—the principle of absolute dominion where there is absolute ownership.

Under the principle of law, *Sic utere*, etc., I think it is incontrovertible that where the surface and subjacent strata or estate in the same land are owned by different persons, and the right of support has not been parted with by the surface owner, the surface owner is entitled to subjacent support; or, as many of the authorities put it, the surface owner is entitled *prima facie* to support. All the authorities agree upon that proposition. Also, all of the authorities recognize the principle, *Sic utere*, etc., as one ground of the doctrine of support. Why? Because when the ownership is severed, two separate estates are formed, and neither may be used by the owner to the injury of the other. The owner of the subjacent estate may not so use his own by removing all of it, as to injure the surface estate; but so long as the removal does not injure the surface estate, he may remove.

Considering this rule of law as the doctrine of subjacent support in this State, how may the surface owner waive or exclude the right of support? which is simply another form of asking how he may waive or exclude the benefit of the rule of law mentioned. I would answer that he may waive or exclude the benefit of this rule of law in precisely the same way that he may waive or exclude it in relation to any other property owned by him, or any other rule of law the violation of which has caused or will cause him injury. It is now fully settled by the authorities, no matter upon what ground they base the right of support, that the surface owner may waive or exclude it by contract. "The right to remove all the minerals in a certain strata, though the support of the superincumbent strata is destroyed thereby, may be created by apt words." 6 Am. & Eng. Dec. Eq., 643, and English and American cases there cited.

In *Smith* v. *Darby*, *supra*, decided in 1872, Lord Blackburn said: "But does not this deed say, 'You may take them absolutely, only making compensation afterwards?' I cannot agree that there is any argument to be derived from the use of affirmative words only, without any negative words. The question is: What was the intention of the parties to the deed, when there is an affirmative promise to pay money to the tenants, and what was the bargain as to the sale of the property? If the owner of a horse said, 'You may take the horse,' and the person to whom this was said had promised to give £20 for it, there is no question that he could not be sued in an action of trespass for taking the horse, because the intention of the parties was that the one was to buy and the other sell the horse. So here the question is whether it appears upon the clauses in the deed that the intention of the parties was that the minerals should go absolutely, without any restriction as to the right of support."

In *Aspden* v. *Sedden*, *supra*, decided in 1875, Sir G. Mellish, L. J., in the opinion said: "If it appears from any express words in the deed, or by necessary intendment from anything contained in the deed, that it was not the intention of the parties that there should be any right to support, the court is bound to hold that the plaintiffs have failed to make out their case." Also, "If liberty is reserved to do the act complained of, that reservation, as between the parties and those claiming under them, makes the act rightful."

In *Buchanan* v. *Andrew*, *supra*, decided in 1873, the Lord Chancellor said: "My Lords, generally speaking, when a man grants the surface of land, retaining the minerals, he is guilty of a wrongful act if he so uses his own right to obtain the minerals as to injure the surface, or the things upon it; and, as prevention is better than cure, the Court would be justified in granting an interdict to prevent him from doing so. But on the other hand, I apprehend it is the clear law of England, and also of Scotland, that when two persons meet and deliberately settle a contract they are at liberty to enter into such terms (not being contrary to the public law) as they may think fit; and if a *feuar* of surface lands is willing to take the risk of any injury which may be done by the working of the subjacent minerals, it is perfectly lawful for him to do so; the person who was previously the owner of

the entirety being under no antecedent obligation to part with any portion previously his own, except upon such terms as are mutually agreed upon. In such a case, therefore, the whole matter resolves itself into a mere question of construction. No views of a conjectural kind as to what is or what is not reasonable can be admitted, if the contract itself is plain and free from ambiguity."

In *Davis* v. *Treharne*, *supra*, Lord Blackburn said, in relation to the exclusion of the right of support: "If Mr. Treharne, when he let the land, had by express words or by necessary implication, said, '*You may take away all the minerals*;' or, 'You must take away all the minerals, letting down the surface,' he had a perfect right, at least before he had made the two building leases, to do so."

Other English cases might be cited on the question of the interpretation of instruments as to waiver or exclusion of the right of support. From them it is simply a question of intention, in the usual way, from the words used in the instrument.

In McSwinney on Mines, this subject is treated under certain divisions. Under the division "(d)," the first case reviewed is *Harris* v. *Ryding*, *supra*. I quote from that work, on page 339, as follows: "With respect generally to the various cases referred to in divisions (b), (g), (d) and (e) of the present subject, the following observations may be made. In the earlier cases the courts, in construing the instruments before them, apparently adopted the curious mode, both in the case of land in its natural state, and of land in its non-natural state, of assuming, in the first instance, the existence of an intention, that the right of support should not be disturbed; and of then proceeding to consider, whether the provisions used could not be reconciled with that intention. In the later cases, on the other hand, the courts seem to have assumed nothing; but to have proceeded at once to construe the instruments before them according to their literal and natural meaning. It is, in many respects, difficult to reconcile the earlier with the later cases; and, on these grounds, the difficulty seems capable of explanation. It need hardly be added that the later cases must, at the present day, be considered authoritative.

"Having regard to these circumstances, the following

propositions may, as the result of the cases, in which the instrument of severance is producible, and in which some contract has been made, or is said to have been made, with respect to support, be considered as established:—

"1. Instruments of severance are, at the present day, construed according to their literal and natural meaning, rather than according to preconceived assumptions of the existence of an intention in the parties, or in the legislature, that the right of support should not be disturbed.

"2. Where it appears from the express words of such instruments, or by clear intendment therefrom, that it was the intention to exclude the right, effect will be given to such intention.

"3. Where the mine owner is relieved from liability for damage, the surface owner may often be presumed to have been compensated by anticipation. But in other cases, the presence of a clause for compensating the surface owner; at all events if it refers to underground working; are material elements in ascertaining an intention to exclude the right."

* * * *

"7. The common covenants to work in the usual and most approved mode, or the common clause in an Inclosure Act under which mines are reserved to the lord, of holding and enjoying them in as full, ample and beneficial a manner as if the act had not been made; or the common clauses giving full liberty of working and winning; are not, of themselves, sufficient to exclude the right."

Other propositions are deduced by the author, which I deem it unnecessary to repeat.

From this it appears that the early English cases, such as *Harris* v. *Ryding*, are discredited in their own land upon the question of the construction of instruments relating to the waiver or exclusion of support, and are no longer considered as authority at home on that question. They are, however, relied on here as conclusive on that question. It seems to me that these early English cases would come with more force, as persuasive argument, if they had not been discredited in the land from which they come.

It is hardly necessary to say that American cases which adhere to, and follow implicitly in the footsteps of, those early English cases, on the question of the construction of

instruments of severance, adopting the same "curious mode" of construction, would be discredited in England, and it seems to me in reason should not be followed by us.

In argument, much stress is laid upon the ability and learning of the English judges. I concede it all. I would detract nothing from their world-wide reputation for ability and learning in the law: but I do say that the trend of the English courts, with all their greatness, is toward, if indeed they have not already come to, the position, to which every other court it seems to me must finally come, of construing an instrument conveying coal or minerals under the ground in identically the same manner in which other written instruments are construed, and in the same manner as instruments conveying any other species of property, free from presumptions or implied reservations not applicable to other instruments of conveyance.

This being the true rule, we seek the intention of the parties to the instrument involved in this case, as the paramount end to be attained. Certain rules of law applicable to contracts are referred to, all of which will simply aid us in ascertaining the intention of the parties. All the provisions of the contract must be considered together. Then resort must first be had to the language used by the parties therein. As has been said, the contract of the parties is the law to them. The words are to be given their plain, ordinary and popular meaning, unless they have acquired a peculiar sense in respect to the particular subject matter, as by the known usage of trade or the like, or unless the context shows that the parties used them in some other and peculiar sense. 17 Am. & Eng. Enc. L. 11; *Railroad* v. *Chutte*, 103 U. S. 118. When the contract is thus considered, and it appears to be free from uncertainty and ambiguity, and the intention of the parties is apparent, the task is at an end. *Uhl* v. *Ohio R. Co.*, 51 W. Va. 106; Story on Contracts, section 780; 9 Cyc. 587: *Gibboney* v. *Fitzsimmons*, 45 W. Va. 334; Devlin on Deeds, section 837; *Salt Co.* v. *Campbell*, 89 Va. 396.

Before the deed in question was made, the plaintiff was the owner of the fee and everything in the land in question. He might have removed the subjacent estate, and permitted the surface to subside. He might have destroyed both, or used them at his pleasure, so long as he did not injure another.

What he might have done himself, he might grant to another the right to do.

For a valuable consideration, the plaintiff granted the coal under the land in question, which means all the coal, and he granted certain mining rights and privileges, among which was the following: "*together with the right to enter upon and under said land and to mine, excavate and remove all of said coal.*" It will be observed that these words are not "the common covenants of working in the usual and most approved mode," or "the common clauses giving full liberties of working and winning." It cannot be said that the minds of the parties did not meet upon the removal of all the coal, when they so expressed it in the deed.

If the right to support may be waived or excluded by contract, what kind of a contract is necessary for that purpose? The plaintiff granted all the coal, and the ownership of the surface and of the underlying coal was severed, creating a separate estate in each. If the deed said nothing more, the owner of each would be bound by the rule, *Sic utere*, etc. If the deed said nothing more, I would without hesitation hold that the owner of the surface would be entitled to support, and that the owner of the coal could not so use it by removing all of it as to injure the surface. The deed does not stop with the grant of all the coal. It contains the express additional grant, on the part of the plaintiff, to the grantee, of the right to enter upon and under said land and to mine, excavate and remove all of said coal. It is contended that the conclusion reached in this case overlooks the fact that the law is a part of the contract so far as the parties have not otherwise contracted. I think it does not. I go further, and say that the parties to this contract are presumed to have known the law at the time they entered into it, and to have known that if the deed rested with the simple grant of all the coal and nothing more the grantor would then be entitled to support for his surface. Knowing the law, the parties undertook to further contract. The grantor being willing to give further privileges, and the grantee desiring further privileges, they placed in the deed a further provision granting the right to enter upon and under the land and to remove all of the coal conveyed. This intent gives effect to the additional grant; otherwise, it would seem to be mean-

ingless, and not to grant more than a way of necessity, which the law would give without it. In fact, that is the position taken by the learned attorneys for the plaintiff. It is true that other mining rights are also granted, and the provisions granting them are not without meaning. But the particular grant of the right to enter upon and under the land, and mine and remove all of the coal, is virtually without meaning if it does not give to the grantee the right to remove all of the coal.

I think there is a vast difference between a grant of all the coal simply, and a grant of all the coal together with the right to enter upon and under the land and remove all of it. Without a right to remove all, the owner of the coal may not do so, if to do so would injure the surface.

As to the waiver or exclusion of the benefit of the rule, *Sic utere*, etc., upon which alone the right to support rests, I ask in what more effective way may it be waived or excluded by the surface owner, than by positively agreeing or consenting, for a valuable consideration, to the specific use complained of? The plaintiff complains of the use by the removal of all. He has by express, positive words, not by implication, agreed to the specific use of which he complains. No claim is made that the words used have any technical meaning, as applied to the subject matter of the deed. The words are intelligible to all. They mean the same to the linguist and the unlettered. If the English language were searched for words of consent or agreement to the removal of all the coal conveyed, I apprehend that none more appropriate could be found. Then, has the defendant so used its property as to damage the plaintiff? According to the averments of the declaration, it has; but we cannot stop there. Has not the plaintiff consented and agreed to that specific use by his solemn deed, and thus been barred of his right to complain? If the plaintiff is injured by the performance of the contract, is it not *damnum absque injuria?* I must answer in the affirmative. So long as the constitutional guaranty of the right to contract exists, a man may so contract, and the contract must be respected by the court. If a party chooses by binding contract to agree to an act resulting in damage to his property, he has the right to do so. It is a proper subject of contract. Can the plaintiff say, I have

agreed in unequivocal terms to the specific use of the defendant's property of which I now complain, but *sic utere tuo ut alienum non laedas.* I have agreed to the act, anticipated the injury, and received the compensation therefor. May I not sue and recover the compensation again? I answer, most certainly not. To answer in the affirmative would be to say that the principle, *Sic utere*, etc., may be invoked to impair the obligation of a binding contract. No such application of this principle is authorized by law. It may not be used to perpetrate a fraud; neither may it be used against the express terms of a contract, or to impair or destroy its obligation.

"It is a general rule of law that no one can maintain an action for a wrong, where he has consented to the act which occasions his loss." 8 Am. & Eng. Enc. L. 698; 1 Broom's Legal Maxims, 268, quoting Tindale, C. J.

In other like cases, where a party has so contracted or consented, it would hardly be contended that he might, notwithstanding the contract, recover damages.

If the owner of a building sell and convey the materials in a story of the building, together with the right to remove all of them, may he afterwards complain of the removal of what he sold? If one sitting on a chair in his own home, sells that chair together with the right to remove all of it, and it is removed under the contract, may he afterwards complain because he has not the support of the chair as he had before the sale and removal? If one agrees that another may do a particular act which otherwise would constitute a trespass to the former's property, and that act is done pursuant to the agreement, may he complain? It is hardly necessary to say that, in such cases, damages may not be recovered produced alone by the specific act agreed to, if there be no negligence or malice in the manner of doing the act. Illustrations might be multiplied indefinitely. The intention of the parties to the deed is apparent, certain and unambiguous, from the language used. The language of the deed gives the grantee the right to remove all the coal.

It may be claimed that, although the grantee is given the right to remove all the coal, if he does so he should provide artificial support. As said by Baron Bramwell, this is impossible, owing to the expense. I doubt if it is possible to

support a whole tract of land *modo et forma* by artificial means. It seems to me that there must be some subsidence, some settling, of the surface, if artificial support alone be resorted to. What has been said in relation to agreeing and consenting to the specific use, disposes of the question of artificial support as effectually as the question of natural support. Taking the deed as it is averred to be, we find no express covenant for artificial support. I do not think that artificial support was within the contemplation or intention of either of the parties when the deed was made. No language was used from which such intent may be implied. The court cannot make a contract for the parties, and cannot extend or enlarge one already made.

Many of the English cases lay stress upon the fact that, under the particular instruments before them, the mining rights applied to acts to be done upon the surface of the land only. If anything were needed to show the contrary intent here, the word "under," when read with the rest of the deed, certainly performs that function. It cannot be said, if the word "under" is to have effect, that it does not clearly mean that the rights granted may be exercised under the land, and that the right of removal relates to the coal conveyed under the land. It may be claimed that the word "under" should be excluded as repugnant. Why should it be excluded? The claim is that it is in conflict with the dominant and primary intent of the deed. Is this true? What is the primary or dominant intent of the deed? The primary or dominant intent is to convey the coal *under the ground*, and the right to remove all of it *under the ground* is not in conflict but consistent with this dominant intent. It is argued that the dominant intent of the deed is to reserve the surface. I cannot agree with that. The plaintiff does not own the surface by virtue of this deed. He was the owner of it before this deed was made. He derived title to it, as well as to the coal conveyed, from some other source. He simply did not part with the surface by this deed, farther than therein specified. No reservation of surface is expressed in the deed. It was not necessary to do so. I must give meaning and effect to the word "under," because I believe it is rational and consistent with the residue of the deed to do so. "Rules of construction are adopted with a view of ascertaining the in-

tention of the parties, and are founded in experience and reason, and are not arbitrarily adopted. They are not intended to make terms for the contracting parties. but simply to ascertain what the language means which they have employed in their contracts." 2 Devlin on Deeds, section 837.

If, however, there were a doubt (which I do not concede), then the rule that the deed must be construed most strongly against the grantor is applicable. "Where the grant shows the intention, even though ambiguously stated, following the rule that it is construed most strongly against the grantor, the right to surface support will be held not to exist." Snyder on Mines, section 1032, and cases there cited. It is said that this rule, that a deed must be construed most strongly against the grantor, is the last rule to be resorted to, after everything else has failed, and for that reason it is inveighed against in argument. If it be the last, and there remains ambiguity after the others have been applied, it must certainly be applied before reaching a decision in favor of the grantor. It hardly seems fair to treat this rule so harshly, when we remember that we have a statute (section 2, chapter 72, Code,) designed at least to emphasize and carry it into effect. Mr. Minor in his Inst., Vol. II, p. 918, speaking of the like statute in Virginia, says that it "seems to be designed to carry this principle of the common law yet further, although there has been as yet with us no judicial determination as to its construction. The enactment is that every deed conveying lands shall, unless an exception be made therein, be construed to include all the estate, right, title and interest whatever, both at law and in equity, of the grantor, in or to such lands."

I think the language used in the deed under consideration, no matter what may be the ground upon which the right to subjacent support is thought to be based, is sufficient to exclude the right to support. I would apply here the same rules of construction applicable to other instruments of like character conveying other property; no stronger, no weaker, but with the same effect upon all. This is the trend of many of the late cases and authorities and I feel that it is the true rule.

Section 7, chapter 79, Code, is cited as bearing upon this case. In my judgment, it has no application.

It is contended that the court should look at the hardship of a decision in favor of the defendant. If the contract is binding, the court cannot relieve against it because of hardship alone. It is claimed by each side that great hardship will result, in case of an adverse decision. This may be true: but if true, it is a hardship of their own making.

According to the declaration, the plaintiff's surface has subsided, and damage resulted. If the plaintiff was required to leave, of the coal conveyed to it, enough to support the surface, which is estimated at from one-fourth to one-half of the whole, then the part so left would be of no value in place to the defendant. Under our law, the defendant, being the owner thereof, must pay taxes on the portion left, through all the years to come. It is persistently urged that the modern and best methods of mining require the removal of all the coal for the benefit of the surface: that to do so permits the surface to re-form and the remaining strata to re-unite, thus preventing the continuous draining of the water from the surface. This may or may not be true; I do not know. If true, the damage to plaintiff's surface may not be so great as it otherwise would be.

My only apology for the length of this opinion is the importance of the questions involved. For the reasons stated, I concur in the decision.

POFFENBARGER, JUDGE, (*dissenting*):

I am unable to concur in the view of my associates in this case, because I do not think it has been, or can be, reached without violating sound and well settled principles, and especially rules governing the interpretation and construction of deeds and contracts. The opinion avowedly disapproves and repudiates vital principles of the law of subjacent and lateral support, declared by every American court that has ever applied that law to a deed or contract by which the surface of land has been separated in title from the underlying coal, as well as the decisions of the English courts. It expressly condemns, by name, the decisions of Alabama, Illinois, Indiana, Iowa, New York and Pennsylvania, and those of Ohio and perhaps other states without express reference to them. It demolishes at one fell blow the entire system of

English and American law on the subject. This the opinion fully and expressly concedes.

An effort is made, however, to free the case from the operation of the principles declared by the numerous decisions, thus repudiated and disapproved by this Court, but uniformly recognized and rigidly enforced by all others in the English speaking world, because of an alleged variance in the language of this deed from that of the ordinary deed conveying coal without the surface. After conveying all the coal in the tract of land except about three acres, the deed further stipulates, among other things, that "The party of the second part (grantee of the coal) and his assigns is to have the right of way through said reservation for a road, air-course and tram-way necessary or convenient for the mining and removal of said coal and the coal under coterminus and neighboring lands, *together with the right to enter upon and under said land and to mine, excavate and remove all of said coal.*" Immediately connected with this there is further language to be noticed later. Conceding, for the purposes of illustration and argument, that a mere grant of all the coal would not confer, by implication, the right to deprive the surface of subjacent support by removing all the coal, the opinion asserts that the clause above quoted confers, by express grant, the right to remove every particle of the coal, and that the grant of such right of removal is an express grant of the right to take away the support of the surface, because the destruction of the support is the necessary and inevitable result of such removal from under the surface, provided no artificial support be substituted. This is the theory advanced by counsel for the defendant in error and adopted by the Court as a means of escape from the effect of the general principles declared by all other courts, in cases involving the interpretation of deeds, severing minerals from the surface by grant or reservation thereof. If it is untenable and unwarranted by the language of the deed, this decision is squarely contrary to said principles, and, in legal effect, as well as declaration of opinion, denies that they obtain in the law of this State, although universally approved as sound in all other jurisdictions. In determining whether this deed may be so distinguished, for the reasons aforesaid, it is certainly not improper to ascertain what reply other courts have made to

the same contention, based upon similar, if not identical, clauses in deeds of this class. If they have held such clause, taken in connection with a previous clause, granting the coal, insufficient to authorize the destruction of support of the surface and to distinguish the deed from one granting title to the coal without saying more, then this decision ignores and repudiates the application of rules of construction and interpretation, made by courts of the highest credit and repute, and without showing wherein they have erred in doing so.

One of the earliest cases on the subject, *Harris* v. *Ryding*, 5 M. & W. 60, decided in 1839, by the English Court of Exchequer, presided over by some of the most distinguished jurists whose names are recorded in the annals of our jurisprudence, including the great Sir James Parke, construed a deed, which, in all material respects, was like the one now under consideration here. By it, A., being seized in fee of certain lands, granted it to P., his heirs and assigns, reserving to himself, his heirs and assigns, "all and all manner of coals, seams and veins of coal, iron ore, and all other mines, minerals and metals which then were, or at any time, and from time to time thereafter, should be discovered in or upon the said premises." By this language, he retained the title to all the coal. Then follows an additional reservation, which, it was claimed, conferred right to remove all the coal and destroy the support of the surface. It was in these words grammatically annexed to the words of grant: "with free liberty of ingress, egress, and regress, to come into and upon the premises, to dig, delve, search for, and get, the said mines and *every part thereof, and to sell, dispose of, take and convey away the same, at their free will and pleasure.*" In that case, as in this, it was urged that this last clause must have effect; that the words thereof must be deemed to have been used in their usual and ordinary sense and meaning, and, given such effect, that they authorized a removal of all the coal and so necessarily carried the right to injure the surface by destroying its support. Counsel in the argument of that case, said: "The defendant was entitled to work out all the mines, but he could not do so if he was obliged to leave props, which would be of coal to support the surface." But the court, after mature consideration, replied thus: "Under this reserva-

tion, A. was not entitled to take all the mines, but only so much as he could get, leaving a reasonable support to the surface." The clause of the deed, giving the right to enter upon the land to seek for, get, *and to sell, dispose of, take and convey away all the said mines and every part thereof* was not overlooked by the court in reaching its conclusion. In respect to it, Lord Abinger said: "The defendants' counsel, therefore, seeks to carry the right of the defendants a step further by the operation of the words in the exception, giving a right of ingress upon the land. Now the meaning of that exception was to meet the difficulty the defendants laboured under, of not being able to enter upon the land to sink shafts, and make use of those shafts for the purpose of getting their mines. I think there is no new right reserved thereby more than the right to use the surface, for the purpose of getting the mines; but it does not enable them to get them to a greater extent, or in a manner unusual and improper, so as to prejudice the surface of the land. I cannot therefore see how the exception relied upon by the defendants at all assists their argument. That exception was rendered necessary by parting with the surface of the land; it applies to the liberty the grantor has of going upon the surface, and does not apply to the right he has below." Maule, Baron, said: "I think the covenant or stipulation, giving them the power to go upon the plaintiff's land, and providing that they are to make compensation for it, applies merely to acts done upon the surface of the land, that is, disturbing the surface by digging, sinking shafts, and so on; all those things they are authorized to do, but not absolutely, only conditionally upon making compensation; and that liberty has nothing to do with the right of getting the mines, which may be taken to be done on this occasion without breaking the plaintiff's soil; but their right to get the mines is the right of the mine-owners, as against the owner of the land which is above it." Parke, Baron, after setting out the terms of the reservation and the power to enter upon the land and take away the coal, said: "It is clearly the meaning and intention of the grantor, that the surface shall be fully and beneficially held and enjoyed by the grantee, he reserving to himself all the mines and veins of coal and iron ore below. * * * This is the true construction of this deed, in order to make it operate ac-

cording to the intention of the parties. * * * If that is the true construction of the reservation and power, the defendant ought to have stated in his plea that he took the coal he did take, leaving a reasonable support for the surface in the state it was at the time of the grant."

Another parallel case is *Carlin & Co.* v. *Chappel*, 101 Pa. 348. One Brown conveyed to Lewis certain lands by deed containing the following clause: "Excepting and reserving to John Brown all the coal underlying said lots of ground, the right and full and free privilege of ingress, egress and regress for digging, mining and excavating said coal (for the purpose of mining, digging, excavating and conveying away said coal)." By sundry conveyances, the title to part of the land came to Chappel and the last deed contained this clause: "All the coal underlying the same, together with the full and free privilege and right of ingress, egress and regress, so far as may be required for digging, mining, excavating and conveying away said coal, being vested in John Brown." Counsel for the defendant in error said in the argument that as the grantor had expressly excepted and reserved all the coal underneath the lots conveyed, with the right to mine and take it away, he and his assigns of the coal were not liable for damages to the grantees of the surface, or their assigns, for any result following the removal of all the coal. But the court unanimously resolved as follows: "Where the owner of land conveyed it in fee simple, excepting and reserving all the underlying coal, with the right of mining, excavating and conveying away the same; and subsequently conveyed to another party the coal and privileges so excepted and reserved: *Held*, that the grantor's assigns of the coal were liable for damages occasioned to the owner of the surface by subsidence caused by mining the underlying coal." In *Williams* v. *Hay*, 120 Pa. 485, the deed conveying away the land, expressly reserved to the grantor the right to take all the coal and afterwards the necessary rights of way for the full exercise of the privileges were reserved. It is much stronger than the language used in the deed now under consideration. It reads as follows: "Reserving, however, to the use of the said W. J. Baer, his heirs and assigns forever, the full and perfect right and privilege of searching for, mining, procuring and taking away by such ways and means as to the said W. J. Baer, his

heirs and assigns, may seem fit and practicable, *all the coal*, iron ore, metals, limestone, fire clay, and all other mineral substances, whatsoever, whether solid or liquid, lying and being upon, under, and contained within the surface of the land hereinbefore mentioned and described, (exclusive of the three (3) acres around the buildings,) and the necessary right of way for the full exercise of privileges as aforesaid, Provided, however, that the said W. J. Baer, his heirs and assigns, in mining and removing the coals, iron ore and minerals aforesaid shall do as little damage to the surface as possible." In view of the decision in *Carlin & Co.* v. *Chappel*, cited, it does not seem to have been urged in this last case that the right to remove all the coal carried with it the right to destroy the support to the surface, but it was insisted that this grant together with the clause recognizing the right to damage the surface, disclosed upon the face of the deed intent to permit the support to be destroyed and the surface thereby damaged. But the court said: "Where one person owns the surface and another the underlying coal or other minerals, the absolute right of the former to surface support is not to be taken away by a mere implication from language not necessarily importing such result. Such right is not affected by a clause in the deed conveying the surface but reserving the coal, which provides that the grantor, his heirs or assigns, in mining and removing the coal 'shall do as little damage to the surface as possible.' "

In *Burgner* v. *Humphreys*, 41 O. St. 340, the court held as follows: "If the owner of land grants a lease whereby he conveys all the underlying mineral coal, *with the right to mine and remove the same*, the lessee will not be entitled to remove the whole of the coal without leaving support sufficient to maintain the surface in its natural state, unless the language of the instrument clearly imports that it was the intention of the lessor to part with the right of subjacent support." In that case the grantor owning a tract of land, bargained, sold, transferred, aliened and conveyed to another "all the mineral, coal, iron ore, limestone and all the other minerals" under or upon said tract of land, and further gave, granted and conveyed to said other parties "the right, privilege and license to enter upon the above described land at any and all times hereafter and search and explore thereon

for said mineral, coal, iron ore, limestone, clay and other minerals, oil and salines, or for any of them, and *when found to exist on said land, to dig, mine and remove the same therefrom.*" The deed then went on and granted all the rights, privileges, licenses and easements necessary or incident to the proper prosecution of the business of mining and removing any or all minerals or substances aforesaid. It is to be observed here that this deed gave expressly the right to remove all that had been granted. It granted all the coal and granted the right to search for it and remove the same. "Same" in that connection could mean nothing other than all the coal, but the court said the deed conferred no right upon the grantee to disturb the surface by withdrawing its support. No doubt, the clause giving the right to remove the coal was strongly urged as a relinquishment of the right of support, for counsel for plaintiff in error conceded that the lease of coal carried with it the right to open the mines and explore, and if coal was found to dig and remove it, but they insisted that the mine owner had no right to remove all of it, including props and pillars, in the absence of an express relinquishment of the right of support by the owner of the surface, and the court, as above shown, sustained that view. In *Livingston* v. *Coal Co.*, 49 Iowa 369, the clause conferring the title to the coal was in this language: "And reserving also to said first party, his heirs, successors and assigns, all coal, coal mines, mineral products and oil beneath the surface of, and belonging to, said premises, with full and sole right to mine, and obtain and remove the same, by such means as they deem proper, without thereby incurring, in any event whatever, any liability for injury caused or damage done to the surface of the land in working coal, coal mines, minerals, mineral products and oil, and removing the same, provided the said first party shall not enter on the surface of said lands." Upon this deed the court held that support for the surface could not be destroyed. Here, it is to be observed that all the coal, together with the right to remove the same, was reserved, which meant the right to remove all the coal, if the language is to have the effect the terms used import.

In all the above mentioned cases, the deeds contained clauses giving the right to remove all that was granted. How the deed from Griffin to Camden can be distinguished from them

is not perceived. It granted all the coal under the tract of land and gave the right to enter upon the land and remove all the coal. Can it be doubted that the deeds in the Ohio case, and in the Iowa case, and *Williams* v. *Hay*, 120 Pa. 485, used language purporting to confer the express right to remove all the coal? There is no claim that the language of the deed under consideration here does more. The deed in *Williams* v. *Hay* did that and added a clause which purported to recognize the right of the mine owner to damage the surface, and yet the court said there was no language in the deed by which the intent to waive support of the surface was sufficiently evidenced. In the Iowa case, there was an express grant of the right to remove all the coal, and, in addition thereto, language which purported to relieve the mineowner of any liability for injury caused or damage done to the surface of the land in working coal, coal mines, minerals, mineral products and oil and removing the same, provided said owner should not enter upon the surface of the land, and the court said that was not sufficient. It is said in the argument that this last decision denies to the owner of the surface, on grounds of public policy, the power to release his support by contract. No such reason is anywhere given in the opinion for the conclusion arrived at in that case. Certain English cases, recognizing such right and power are referred to and the principles announced in them not denied or criticised. It was said of them that they did not go so far as to confer the right, under such a contract as the court was considering, to remove all the coal without liability for negligence in not placing pillars for support of the surface. This may have been an erroneous view of those cases, and the Iowa decision may be wrong, but it is no declaration of public policy forbidding the owner of the surface to part with his right of support by express contract.

As to the interpretation of this clause there may be differences in some of the decisions above referred to. In *Harris* v. *Ryding*, 5 M. & W. 59, Lord Abinger said the clause giving right to enter and remove every part of the coal, was inserted for the purpose of authorizing an entry upon the land, for the purpose of exploring and searching for, and carrying away, the minerals, which he seems to have thought was necessary to give such right of entry. In this view, Maule,

Baron, concurred, and thus they denied to it evidence of intent to authorize the removal of all the coal. Parke, Baron, without giving any reason for its insertion, said, "I do not mean to say that all the coal does not belong to the defendants, but that they cannot get it without leaving sufficient support." The American cases seem to concede that a clause granting the right to remove all the coal will authorize the removal of all of it, but will not carry, by implication or otherwise, the right to destroy the support of the surface. They say it does not amount to an express relinquishment of the right of support and that no such right can be relinquished otherwise than by express language, disclosing plain intent to do so.

But it is said that, if the clause giving right to remove all the coal does not authorize the destruction of the support of the surface, it has no effect, for there is no other function it could perform, and the parties are not presumed to have used any language in their contract without purpose, and that the rules of construction require that every word shall have some effect, if possible, and as much effect as it may have consistently with other parts of the instrument. No fault is to be found with these propositions of law. They are sound and incontrovertible, but how about their application to the clause used in this deed? By reference to JUDGE MCWHORTER'S opinion, it will be seen that the first part of the clause relied upon confers a right of way through a reservation of coal in the plaintiff's land, which the grantee did not take by his deed and through which he could have no right to go without an express grant of the right of way. There was necessity for this part of it. It performs an important function. Then follows this language: "Together with the right to enter upon and under said land and to mine, excavate and remove all of said coal." But it does not stop there. It goes on and confers the right to remove upon and under this particular tract of land, coal to be mined upon other tracts of land, coal which had been, or might be, purchased from persons other than Griffin. There was reason, therefore, for not stopping with the mere grant of title to the coal and a way through the three acre reservation. Without this clause they could not have removed, through Griffin's land, coal taken out of lands of other people. There was absolute necessity

for these two additional clauses. There may not have been any absolute necessity for so much of the stipulation as conferred the right to enter upon and under said land to mine, excavate and remove all of said coal. The grantee of the coal would have the right, under the law of necessity, to do this. When a man grants a thing he grants with it, by necessary implication, the means of getting to it. But this principle does not prevent the parties to a deed or contract from expressly stipulating for rights which the law would give without such stipulation. Illustrations of this are to be found in almost every oil lease and coal lease and purchase of timber, operative within the limits of the State. Although, when timber is purchased on a tract of land, or oil and gas under it, or a lot or tract of land out of the interior of another, and left surrounded by the residue, the law gives the right to go upon the land and cut the timber or bore for oil and gas, and a right of way to the owner of the lot or tract of land so purchased and situated, the deed or contract almost always contains an express stipulation for such right of entry or way. This denies that express contracts for rights which the law gives are deemed useless and without purpose. Are express contracts never made where the parties may rest their rights upon the law? Money advanced without an express contract of repayment may be recovered. Goods, wares, and merchandise delivered to a party and by him consumed, without an express promise to pay for them, gives a right of action for the recovery of their value. But does this principle prevent men from taking notes in such cases? And, if in such case, a man takes a note for the money or the value of the goods, is he regarded as having done a vain, useless and foolish thing? If Mr. Camden preferred to have an express stipulation in his deed for entry upon the land, mining, excavating and removing the coal, rather than rely upon the law of necessity, giving him these rights by implication, is he to be regarded as having had it inserted for no purpose whatever, because, forsooth, the court denies to him the right to establish some other or different purpose or reason for its insertion? Will his assignee be permitted to advance, as a pretext upon which to found the construction it wants, the lack of another and different and baldly apparent purpose? If the court will not permit it to operate as a relinquishment of the

right of support, could he not rely upon it in the court as a covenant for the right of entry upon the land? If we say no other purpose than to authorize the destruction of the support of the surface is discoverable, then we must say that, in no case in which a man could assert his rights without written evidence of the contract, does the taking of such evidence admit that there was any reason for it or purpose in it. But this is not all. The law gives no more than is necessary. It does not consult or provide for the mere convenience of the party who must appeal to it alone for his rights, but gives only what he can get along with. Parties often want more than this, and, therefore, stipulate for it. So did Mr. Camden in this case. After providing for entry upon the land for the purpose of mining, excavating and removing his own coal and the coal from adjacent coterminus and neighboring lands, he, in the same clause and immediate connection, stipulated for the right to make all structures, road ways, excavations, air-shafts, drains, tramways and openings necessary *or convenient* for the mining or removal of said coal and the coal from coterminus or neighboring lands. Not satisfied to depend upon the law of necessity for the privileges of structures, roadways, excavations, air-shafts and so on, he stipulated *for all such things as might be convenient.* Can it be said that this does not evince a purpose limited to the working of the mine conveniently and successfully which stops short of the right to take away the support of the surface, and that, if he cannot take such support under this clause, the clause is useless and valuless to him and there was no reason for putting it into the contract? An affirmative answer to this question would do violence to the rules of construction and be at variance with the known practice of all classes of business men everywhere, at all times, and in all relations. Even if this express contract did not broaden the rights of the grantee in extent, as to the rights of way and structures, it is a contract of a higher nature than a mere implied right, for such right is merged in it. An action for its vindication would have to proceed upon the express contract. But it is said no reason is yet assigned for the use of the word "all" in the clause conferring the right to remove the coal. Why did not the stipulation stop with a grant of the right to mine, excavate and remove "the coal"

or "said coal?" Does not the word "all" prefixed signify every particle of the coal? Can it mean anything else? Plainly it does not necessarily mean that. In seeking its meaning we must consider it in connection with its immediate context, the language of the clause in which it appears. The purpose of that clause is to give the right to necessary and convenient roads, ways, structures, shafts, etc., and it was desired that such necessary and convenient things should extend to all the coal, that is, to the coal under all portions of the coal area purchased, the coal in the northern, southern, eastern, western, central and all other portions of that area, and the most apt words and expressive terms for securing such right were "all the coal." That is the sense in which it is generally used in conveyances. A deed generally grants all of the tract of land, which it purports to convey. In a sale of timber or growing crops, the contract almost invariably uses the word "all," unless something is to be excepted. Its use here by no means necessarily signifies intent that every particle of the coal may be removed.

It being thus demonstrated that this deed differs in no essential or material respect from those construed, by courts everywhere, as not authorizing destruction of the support of the surface, and as leaving the parties, as to the matter of surface support, in the situation in which they would be if the deed merely conveyed the coal, reserving the surface, or conveyed the surface, reserving title to the coal, it becomes necessary now to inquire whether this construction is right, as tested by the rules of construction and to point out the fallacy, if any, in the numerous decisions which have so construed such contracts, and, incidentally, to ascertain whether the reasoning found in JUDGE MCWHORTER'S opinion has clearly demonstrated misapplication of the rules of construction in the long line of decisions which the Court repudiates and overthrows.

In deeds, as well as in other contracts and in statutes, the intention controls, and the object and purpose of all interpretation and construction is to ascertain the intention. For this purpose, rules have been devised and prescribed by the courts. Dominant over all other rules of that kind is the one which declares that the whole instrument shall be considered and the intention expressed in every clause and in every word

thereof shall be reconciled and harmonized, if possible. 13 Cyc. 605. Chitty on Contract, Volume 1, page 106, states this rule in different language and as the language strongly illustrates the meaning of the rule it is quoted. "An agreement or contract shall have a reasonable construction, according to the intent of the parties: as if a man agree with B. for twenty barrels of ale, he shall not have the barrels when the ale is spent." "In the construction of contracts, all the provisions thereof shall be taken into consideration and reconciled if possible, so that the true intent of the parties to the contract may be ascertained." *Barber* v. *Ins. Co.*, 16 W. Va. 658; *Heatherly* v. *Bank*, 31 W. Va. 70. Closely akin to this great dominant rule, requiring the construction of the contract as a whole, comes the next most important one, namely, some meaning must be given to every clause, word and expression, if it can reasonably be done, consistently with the general intent of the whole instrument, so that the deed may operate, if by law it may, according to the intention of the parties. Another rule of great importance, but clearly subject to exceptions and modifications, where the application of the rules above referred to require it, is that which says words must receive that interpretation which is given by the common usage of mankind. That is, as a general rule, the words must be given their popular ordinary meaning. This rule is subject to many exceptions, but the other two are subject to none. They are invariable and unalterable. Whether a word is to be given its literal meaning must be determined in view of the circumstances under which it is used and the context. Where a word has a popular meaning and a technical meaning, the rule requires that the technical meaning shall prevail. Non-technical words are not to have their plain, natural, grammatical established, definite, usual, obvious and ordinary meaning, if the paper is ambiguous on its face. 13 Cyc. 606. Nor are they to have such meaning if, to give it to them would prevent a rational exposition of the whole contract. *Id.* "A literal interpretation will be abandoned where it leads to a capricious and irrational result, if such rational exposition can be followed." *Id.* It is upon this rule, relating to the sense in which words shall be taken and given effect, that the whole theory of the defense to this action is based. It is upon this rule that the

whole contention of counsel for defendant in error, as to the construction of the deed, is founded. It is obviously subsidiary and subordinate to the two rules above referred to, and if in applying it to this deed, as counsel for defendant in error contend, it conflicts with the result of the application of the other two rules to the contract, then it must yield.

What is the general intent manifested by this deed? The grantor owned the tract of land from the sky to the center of the earth. He granted away the coal only. Therefore, he retained the surface. He did not reserve the surface, he excepted it by putting no language in the deed which could take any part of it away from him. The dominant intent of the whole contract is that the grantor shall retain the surface and the grantee shall have the coal. All other parts of this deed must receive such construction as will not make them conflict with this general intention, if it be possible to do so, and yet give them some reasonable operation and effect. Other parts must not have such effect as to deprive the grantor of the surface or any part of it, unless they so clearly express that intention as to make it necessary to give them that effect. The court cannot presume that by retaining the surface there was any intention, on the part of the grantor, to retain it otherwise than in that state in which nature placed and left it. If, in his hands, it is to become punctured with craters and holes and riven with fissures, so as to deprive him of the use and benefit of it for those purposes for which, by nature, it is fitted and designed, he does not retain the surface in the true and full sense of the word. If, having bargained for the surface, he is to be put off with a broken, ruined and useless piece of land, he does not get what he bargained for. Hence, it will not be presumed, in the absence of words expressly showing it, that he intended to let the support go from under his surface, for the very reason that loss of the support is loss of the surface itself, and the whole general intent of the contract, viewed as a whole, is defeated so far as the grantor is concerned, and thereby the first great rule of construction violated. On the other hand, the intent plainly disclosed is that the grantee shall have the coal and all of it. And if he is entitled to all of it, he may remove all of it, but he cannot take with it any part of the surface, because the intent that the grantor shall have that is just as full and

plain as the intent that the grantee shall have the coal. Therefore, although entitled to remove all the coal, if this contract gives such right, he still has no right to withdraw the support, because he may substitute artificial, for the natural support. Impracticability of artificial support, because of the great expense is the only answer to this. But that depends upon the circumstances. As a matter of fact, such support is sometimes employed. The books contain reports of cases referring to instances of the substitution of artificial, for natural, support. But, be this as it may, the deed cannot be so construed as to take away any part of the surface, if the other portions of the deed can have some reasonable effect without doing so. Repugnance is to be avoided if possible. That which is plainly guaranteed to the grantor by an exception, the surface, cannot be cut down or impaired by another clause of the deed, if that other clause can have reasonable effect in some other way,—can subserve some other purpose useful to the grantee. That it can, and does, has been clearly demonstrated. It gives the important rights of entry upon the land, of excavation, of removal, and of necessary and convenient ways, shafts, structures, etc., as to all the coal, and, if it be limited to these things, plainly co-extensive with the utmost signification and import of its terms, the clause is consistent with the general and dominant intent of the whole instrument. Thus every portion, provision, clause and word is given effect as required by law. The other construction would defeat the general intention and subject the whole instrument and the general intention to the domination and control of the single word "all" and without necessity, as has been clearly shown. This would stand aside the great rule, requiring effect to be given to the general intent, which is absolute, for the subsidiary rule, requiring effect to be given to every word, which is not absolute except to the extent that some function must be found for each word. It is not absolute as to what office it shall perform or the extent to which it shall be effective, and under it, the import and meaning of mere words are required to be curtailed and limited so as not to conflict with the general intent expressed.

"And as the meaning to be put on a contract is that which is the plain, clear, and obvious result of the terms used there-

in; so these terms are to be understood in their plain, ordinary, and popular sense, unless they have, generally, in respect to the subject-matter,—as by the known usage of trade or the like,—acquired a particular sense, distinct from the popular sense of the same words; or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special sense. And the same rule has been thus stated: "words are to be construed according to their strict and primary acceptation, unless, from the context of the instrument, and the intention of the parties to be collected from it, they appear to be used in a different sense, or unless in their strict sense they are incapable of being carried into effect." Chitty on Contracts p. 113. "As a rule, the terms of a contract are to be understood in their ordinary and popular sense, rather than in their strict grammatical or etymological meaning. Subject to this rule, words are ordinarily to be understood in their plain and literal meaning. * * * However, the literal meaning will not be adopted by the court against the intention of the parties as evidenced by the entire contract." Hammon on Contracts, pp. 812–13, section 412. "As in the case of all contracts, the intent of the parties to the deed, when it can be obtained from the instrument, will prevail, unless counteracted by some rule of law. * * * The rule is that the intention of the parties is to be ascertained by considering all the provisions of the deed, as well as the situation of the parties, and then to give effect to such intention, if practicable, when not contrary to law." Devlin on Deeds, section 836. "Manifestly, no general rule can be laid down as to the construction of particular words. The primary object courts have in view is to carry out the intention of the parties." *Id.* section 864. In order to do this, words are often ignored entirely or discarded as meaningless and useless, and, in some instances, a meaning and effect are given to them entirely different from what they import, in order to effectuate the general intention shown by the deed. Numerous illustrations of this might be given but one or two will be sufficient. If it appears, from the terms of a deed, and the circumstances connected with the execution that the grantor meant children, although he used the word "heirs," effect

will be given to it accordingly, and the deed will not be defeated, by the general rule that a conveyance to the heirs of a living person is void. *Heath* v. *Hewitt*, 127 N. Y. 166; *Vickars* v. *Lee*, 104 N. C. 248; *Griswold* v. *Hicks*, 132 Ill. 132; *Broliar* v. *Marquis*, 132 Ill. 194; *Broliar* v. *Marquis*, 80 Ia. 49. The term "heirs at law" may be construed as children, or grand children, where such a construction will effectuate the grantor's intention, and is consistent with legal principles. *Waddell* v. *Waddell*, 99 Mo. 238. "Generally whatever is inconsistent with the real intention of the parties as ascertained from the language of the whole instrument may be rejected as superfluous, or false or mistaken, or repugnant, provided no rule of law be violated thereby, so as to give effect to the deed according to the intent. But although words may be rejected which are repugnant to other parts of the deed and to the general intention of the parties, nevertheless no word is to be rejected, unless there cannot be given a rational construction to the instrument with the words as they are found." 13 Cyc. p. 619, article on deeds.

Under the application of these rules there can be no doubt that the general intention of the parties to the effect that the grantor shall have the surface in the full sense of the term and the grantee the coal, must govern and control the subsidiary clause giving right to enter upon the land and mine, excavate and remove all the coal, for these words may have reasonable and important force and effect without working such disturbance, and, under these rules, the court must so limit their effect. This clause adds nothing to the grant of the coal. The grant alone gives the right of removal of all of the coal, if it can be done without depriving the surface of its support. No additional words are required to confer that right. It exists without any additional clause. The mere addition of the right to remove all the coal, without language in connection with it, disclosing intent to allow the surface to be thereby injured, leaves the parties in the same situation as if the deed stopped with a mere grant of the title to the coal. The value and character of the surface in its natural state cannot be cut down or impaired without the employment of language expressly and necessarily showing such intent.

Under the operation of these rules of construction the

courts have said, uniformly, that, in order to take away the right of support, the language used must not only authorize the taking of all the coal, but must go further and authorize in terms or by such language as clearly shows the intent, the letting down of the surface. There must be some words which can refer to nothing but the surface. No such language appears in this deed; no right to compensation for damages to the surface is stipulated for. No word is used which says the surface may be let down or necessarily means that. In *Davis* v. *Treharne*, 6 App. Cas. 460, Lord Blackburn said, in construing a coal lease, under which royalty was to be paid, not a deed conveying coal, that, if the lessor had said by express words or by necessary implication, you may take away all the minerals, or, you shall take away all the minerals, letting down the surface, he would thereby have relinquished his right of support, and that the fact, that it was to the interest of the lessor to have all the coal removed because he derived a royalty therefrom, might be considered as material on the question of intent. But the words of that lease omitted to say the surface might be let down and it was held that the support could not be withdrawn from under it, although it was a lease and although it contained a clause stipulating for compensation to the lessor for any damage or injury done to the surface of the said farms or lands. This stipulation was referred to, and held to be governed by, the clause giving the right to erect buildings and machinery and to do and execute all such other acts, works and things, upon, in, or under, or above the said premises, as should be necessary and convenient for working and carrying away the minerals, and that the use of the word "under" in that clause did not make it applicable to operations carried on under the surface so as to permit injury to the surface by a withdrawal of the pillars. The general intent disclosed by the whole contract rendered this word irreconcilably repugnant thereto and it was thrown away and not allowed to control the general intent, because its connection was such, its location such, that the court could see that it was never intended to have such effect, and was intended to play a subsidiary and comparatively unimportant part in the contract. It was restrained by its immediate context and had to yield under the force of

the general context, and the contrary intent appearing from the whole instrument.

Now what are held to be deeds and contracts giving the right to take away the support of the surface? What language is sufficient to disclose intent, on the part of the grantor, to relinquish it? In *Smith* v. *Darby*, 7 L.R.Q.B. 716, a deed was held sufficient for that purpose, because it conferred upon the lessees the right to enter and work and take the minerals by this clause: "they, the lessees, their executors, administrators, and assigns, making reasonable satisfaction to the lessors, their heirs and assigns, and their tenant and tenants, for the damage done to them respectively by the surface of their lands being covered with rubbish or otherwise injured, or as he or they should or might sustain, as well by the injury done to the lands of the said lessors in sinking and getting the said mines and mineral and converting coal into charcoal, *as for such damage or injury as may be done or caused in the dwelling house or other buildings of the said lessors by getting mines of coal, ironstone, or other stone or other minerals under or near* to any of the dwelling-houses or other buildings of the said lessors, according to the covenant hereinafter contained." Following this was a covenant that the lessors, in case of damage or injury to any dwelling-house, cottages or other buildings already erected, or to be thereafter erected on the land in lieu of those then on it, and not of greater value than those then on it, "by reason of any minerals being got *under them*, or so near to them *as to occasion such damage or injury*, the lessees and assigns shall at their own cost, on six days' notice by the lessor, rebuild or repair any such buildings so damaged and injured, and put them in as good condition and repair as they were before the damage was done." There was a further stipulation for the payment of damages done to the crops on the surface. These provisions of the contract clearly showed an intention to allow the surface to be injured. They had direct reference to injury to the surface by withdrawal of its support, and, seeing that in the language of the contract, the court said it must have effect according to the intent of the parties. It was impossible to say that buildings could be injured *by getting coal under them* otherwise than from subsidence of the surface and that could result only from lack of support.

Hence, the language clearly showed that the support might be withdrawn. *Eadon* v. *Jeffcock*, 7 L. R. Ex. 379, proceeds on the theory of a difference between a lease and a deed, and seems to go a step further, but in *Davis* v. *Treharne*, above referred to, Lord Blackburn disapproved that case and said the intent to relinquish the right to support must affirmatively appear in a lease as well as in a deed; and the principles announced in *Smith* v. *Darby* are also inconsistent with the theory of *Eadon* v. *Jeffcock*. In *Scranton* v. *Phillips*, 94 Pa. 1, an executory contract of sale determined the rights of the parties in respect to the coal. It excepted and reserved to the vendor the coal under the tract of land and provided that on full payment of the purchase money the grantor was to execute and deliver a good and sufficient deed in fee simple, "reserving the coal and privileges above stated, and with a full and unconditional release and discharge forever, on the part of the said party of the second part, her heirs and assigns, to the party of the first part, his heirs and assigns, *from any liability for any injury that may result to the surface of the said premises from the mining and removal of the said coal;* and with a quit-claim on the part of the party of the second part to the party of the first part, his heirs and assigns, of all right, title and interest in and to said coal, and the privileges of mining and removing the same as aforesaid." In the opinion of the court, this contract sufficiently disclosed intent to permit the surface to be injured by the withdrawal of support. It is stipulated that there should be no liability on the part of the mine owner for any injury that might result to the surface of the said premises from the mining and removal of the said coal. There was no room to say the injury to the surface contemplated might result from entry upon the surface and doing acts thereon. The language was susceptible of but one signification. It said injury to the surface *from the mining and removal of the coal*, from taking the coal from under the land, so as to inflict injury by subsidence of the surface. What a vast difference between that contract and the deed here under consideration! Where, in this deed, is there a waiver of damage for injury to the surface, or reference to such injury? Search for it will be made in vain. In all these cases, the contract showed an affirmative intent to permit injury to the surface by withdraw-

al of the support, and the language used expressing that intent was such that it could be referred to no other subject than injury to the surface by removal of the support. Another case in which support was allowed to be taken away, without liability, is that of *Duke of Buccleuch* v. *Wakefield*, 4 L.R.H.L. 377. It arose under an Act of Parliament, providing for the inclosure of a commons, the minerals under which were owned, at the time of the passage of the act, by the Duchess of Buccleuch, and the surface held by her tenants. The forty-third section of the clause of the Act provided that the owner of the mines should work them "in as full and ample a manner to all intents and purposes as would or might have been done if the said lands had remained open and uninclosed, or this Act had not been passed, without any interruption whatsoever, yet nevertheless making reasonable compensation for damages done by such works as aforesaid to the person or persons sustaining such damage." The court found that prior to the passage of that Act, it had been the usage, custom and practice, of the owner of those mines to take away the support of the surface and pay the tenants the damages occasioned thereby, and as the act provided that the working of the mines should go on in all respects as if it had never been passed, it was held that the mine owner had the right to remove the support but was liable for the injury resulting. By accepting their deeds under the Act of Parliament, the parties were deemed to have assented to the provision of the Act, which authorized the working of the mines to continue in the future as they had been carried on previously. *Rowbotham* v. *Wilson*, 8 H. L. 348, arose under another inclosure act. Under it, commissioners were appointed to allot the land, according to the rights of the various persons interested in them, including the mines. The award of the commissioners, assented to by the persons among whom the partition was made by them, provided that the land so allotted should be lawfully held and enjoyed by the allottees without molestation and without any mine owner being subject to damages on account of working and getting the mines, or by reason that the lands might be rendered uneven and less commodious to the occupiers thereof, or by sinking in hollows, or being otherwise defaced or injured. The court held that, whatever is the general right in the surface to sup-

port, this clause in the award operated as a grant of a right to disturb the surface of the land. But there was nothing left to implication in the terms of that award. They expressly referred to the surface and exonerated the mine owner from liability for injury to it by causing it to become uneven or to sink in hollows or to become otherwise defaced and injured. The language used could perform no other office than that of a relinquishment of a right of support, as in the Pennsylvania case and in all the other cases in which such effect has been given to the deed.

The requirement of expression of intent to impair the surface in connection with the grant of right to remove the coal, stands upon sound reason, arising from the nature of the right of support. There must be enough to enable the court to see that there is a covenant on the part of the surface owner not to sue the mine owner for damages for injury to the surface resulting from subsidence, or in any way molest him in the working of his mine. If the right of support is an easement, or a right *ex jure naturae*, it is a right which cannot exist except as incident to, and a part of, the surface. It cannot be annexed to the coal for, by its nature, it is incapable of such annexation and cannot pass with a grant of the coal. It cannot pass by grant in connection with the coal, nor in any way, because when it is disconnected or eliminated from the surface it ceases to exist. There must be a subject of grant in order to effectuate a grant. The thing which language purports to grant must be capable of being given to another. This easement is not. *Bonomi* v. *Backhouse*, E. B. & E. (92 E. C. L.) 622. Nor can it be the subject of release in the legal sense of the term, because a release passes an estate, or right. In other words, it passes title; and as this right is incapable of existence except as part of the surface, it cannot be passed to another, unless he has the surface which is necessary to its existence. This view is explained in *Rowbotham* v. *Wilson*, by Lord Chelmsford, as follows: "But although the thing itself, namely, the right to support cannot pass by grant, nor be extinguished by release, yet the covenant amounts to a grant of license to do acts which may be completely destructive of that right; and being by deed, and therefore presumed to be founded upon good and sufficient consideration, it is irrevocable and bind-

ing upon all who claim the surface land from Pears. The effect of Pears' deed is, not to transfer to Howlette any right or interest in the coal which might serve as a support to the surface-land, but it operates as the grant of right to Howlette, his heirs and assigns, to work the mines without molestation, denial, or interruption, even to the taking away this support, and defacing and injuring the surface of the land, which, without such a grant, could not lawfully have been done." As tested by the decisions hereinbefore adverted to and by the rules of construction, which are laws to which the court must bow and submit, the mere grant of a right to remove all the coal, unconnected with any words giving right to damage the surface by withdrawal of the support therefrom, does not amount to a grant which can operate, or be effective, as a covenant not to disturb, molest or sue the grantee for such injury to the surface; for the reason that the words "all the coal" are susceptible of more than one meaning. It is an uncertain equivocal grant, not necessarily meaning that the support shall be withdrawn, and grants or covenants which fall short of that intent cannot protect the grantee in the destruction of the right of support.

Another rule of construction which is favorable to the defendant in error, if it were applicable, but which does not seem to be relied upon in the argument, remains to be considered. It is that in deeds and contracts, the language of the grantor, covenantor or promisor is sometimes to be taken most strongly against him. This applies when there is doubt as to the meaning of the contract. It cannot avail here. Hammon on Contracts, at section 413, names six exceptions to which this rule is subject. 1. There must exist in the terms of the contract an ambiguity justifying more than one construction of it. 2. It will not be allowed to defeat the plain intent of the parties as gathered from the entire instrument. 3. It is inapplicable where the terms of the contract were concurrently settled by both parties. 4. It is not allowed where the contract contains anything in its nature odious and unequally burdensome. 5. It does not apply to grants from the sovereign. 6. It is not resorted to in any case until all other rules of construction have been tried and have proved ineffectual. See Chitty on Contracts, p. 137. Any one of he first, second and sixth exceptions will defeat the applica-

tion of this rule to this case. The contract is not susceptible of two constructions. To apply the rule would defeat the plain intent to be gathered from the whole instrument. Other rules of construction make the intention of the parties clear. "This rule is subservient to the ascertained intention of the parties, and is to be modified by the rule requiring effect to be given every word so far as possible; nor is it to be applied or invoked until all other rules of construction fail." 13 Cyc. title Deeds, clause Construction against grantor, 609. Of this rule, Chancellor Kent says: "It is a rule of strictness and rigor, and not to be resorted to but where other rules of exposition fail. The modern and more reasonable practice is to give to the language its just sense, and to search for the precise meaning, and one requisite to give due and fair effect to the contract, without adopting either the rule of a rigid or of an indulgent construction. 2 Kent. Comm. 556. The ambiguity which calls into effect this rule, must be, according to all the authorities, one which will not yield to any other treatment, one which, like Banquo's ghost, will not down at the bidding of any other rule. It must be an obstruction which defies crow-bar, pick and shovel, sledge and stone wedges, drill, black powder and dynamite, and requires, for its demolition, the volcanic action of nitro-glycerine.

All that has been said thus far in this opinion, however, has been put aside by the declaration that this deed is free from ambiguity, in consequence of which no rules of construction can be invoked or applied. The majority opinion, as well as the brief for counsel for defendant in error, asserts and reiterates that the contract is clear and free from ambiguity. I assert that a contract or deed must be read in the light of the rules of interpretation to ascertain whether it is ambiguous. The mental process of analysis must be performed in the reading of the contract in obedience to the rules of construction. The legal effect of the instrument cannot be determined from one clause. All must be read and collectively viewed. No words or clauses will be limited or transposed or otherwise altered from the arrangement in which they are found or the ordinary sense in which they are used, unless some conflict is found to exist, but whether there is such conflict must be determined from an analysis of all

the parts. "It would seem to follow, from the statement just made as to the object of interpretation, that if the language of the instrument is plain and unambiguous in itself, there is no room for interpretation or construction, and it is quite frequently so stated. But in determining whether there is such an ambiguity as calls for interpretation the whole instrument is to be considered, and not an isolated part thereof, this being merely an application of the *rule considered below, that the instrument is to be considered as a whole.*" 17 Am. & Eng. Ency. Law, 4. The first great dominant rule of construction is used first to determine whether there is ambiguity, and that rule controls all other rules of construction. The assertion made, as to lack of ambiguity, a mere assumption based upon three words of this deed, was made in a case lately pending in the Supreme Court of the United States, with reference to a contract which that court had under consideration. But that court, the highest in the land, and at least the equal of any other in the world, speaking through Mr. Justice White, replied as follows: "The fallacy which underlies the assertion as to want of all ambiguity in the bond arises, therefore, from presupposing that in order to establish want of ambiguity in a contract a few words can be segregated from the entire context, and that because the words thus set apart are not intrinsically ambiguous, there is no room for construing the contract itself. In other words, the confusion of thought consists in failing to distinguish between the contract as a whole and some of the words found therein. If the erroneous theory were the rule, then, in every case, it would be impossible to arrive at the meaning of a contract, in the event of difference between the contracting parties, since each would select particular words upon which they relied, and thus frustrate a consideration of the whole agreement. The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them." *O'Brien* v. *Miller*, 168 U. S. 287, 297. "The meaning of the parties to written instruments must be ascertained by the tenor of the writing, and not by looking at a part of it." *Boardman* v. *Reed*, 6 Peters 328. "When

the substantial thing which they have in view can be gathered from the whole instrument, it will control mere formal provisions, which are intended only as a means of attaining the substance." *Canal Co.* v. *Hill*, 15 Wall. 94.

The keynote of the majority opinion is "when a person sells a thing with the right to remove it, or the right to occupy and use it, that he is conclusively presumed, in the absence of a contract to the contrary, to have included in the consideration not only the value of the thing sold, but compensation, for the inconvenience and injuries which will necessarily result by removal or occupation." The fallacy of this proposition is that it assumes everything at issue. It is merely saying in another form and in different words that the contract is not ambiguous. It assumes that the question of the right to remove the coal without leaving support has been determined. Illustrations of the alleged rule are given by saying the sale of logs in the tree, wool on the sheep's back and a growing crop, etc., with the stipulation of the privilege of severing and taking the same away, confers complete title and full dominion over the thing sold. But suppose the purchaser of the wool on the sheep's back should set up a claim, in view of his peculiar practice or mode of enjoying and using such property, to the right to destroy the hide of the sheep, upon the theory that he is entitled, under his contract, to take all the wool and should have that part of it which extends into the skin. Or suppose one who sells a growing crop of clover, stipulating further that the vendee shall have the right to enter upon the land, sever and remove all of said clover, and the grantee should set up, under that contract, a claim to the right, not only to take so much of it as stands above the ground, but to turn his hogs in upon it to dig up and consume the roots. All this would be strictly within the literal meaning of the terms, but no one would pretend to say that any such claims could be sustained. The man who has the title to property and the right to remove the same or otherwise use it must do so in such manner as not to injure the property of another. *Sic utere tuo ut alienum non laedas*, (so use your own as not to injure another's property,) and *prohibetur quis faciat in suo quod nocere possit alieno*, (it is prohibited to do on one's own property that which

may injure another's,) are maxims enforced by all the courts, known to our jurisprudence. They are a part of the common law, and as old as the law itself. No man can free himself from their operation except by a contract which expressly exonerates him from the burden of them. They are rigidly and vigorously enforced by this Court. *McGregor* v. *Camden*. 47 W. Va. 193; *Powell* v. *Bentley & Gerwig Co.*, 34 W. Va. 804. This old and universal law says when a man buys a thing with the right to remove it or occupy and use it, he cannot use it in such manner as to injure the property of another. Title alone gives right to remove and use. Every owner of property has that right, but the law limits that right to the extent of the maxims just quoted, no matter how or from whom he acquired the property, or what its character may be. Here the surface belongs as clearly and as fully to the plaintiff in error as does the coal to the defendant in error, and not one word of the contract necessarily, or fairly, confers upon the owner of either, the right to use his property so as to injure that of the other, except the express stipulation for rights of entry for certain specified purposes. A contract, by which a thing is sold and a right to remove it is conferred, must be governed to some extent by the nature of the thing so sold. Coal differs in its situation and in its nature from all the things enumerated in the opinion. There is no ground upon which a fair and just analogy between coal and any of them can be predicated. An element to be considered in ascertaining the meaning of all contracts is the nature of its subject matter, and this rule is utterly ignored in the comparison made. "In construing a contract the Court considers its subject matter, and reads it in the sense most agreeable to the nature of the contract." Ham. Cont. section 400, p. 796.

It is also said that difference in conditions prevailing in England where the principles of law found in the decisions relating to contracts of this kind originated, from the conditions prevailing here, furnishes some ground or reason for departure from those principles. Coal is coal the world over, has like uses and value everywhere and is mined and handled in the same way wherever use is made of it. The surface has the same general uses and value in

all parts of the civilized world. If any difference should be made, probably it would favor, rather than militate against, the adoption of the principles of the English decisions. In England, much of the coal seems to lie in comparatively level regions and near the surface, so that the inconvenience of supporting the surface is greater than it is here where the coal, for the most part, is found in the mountains and overlaid with hundreds of feet of solid rock, in consequence of which less coal need be left here for the purpose of support. Another criticism made in the brief of counsel for defendant in error, but not mentioned in the opinion is grounded upon an alleged, unjust and unsavory origin of the English decisions on this subject. It is said that the nobility owned the surface and prided themselves upon the number and breadth of the acres held, while the villains, in the feudal ages, operated the mines, and the courts, under the control or influence of the nobility, steadily ruled in the interest of the latter. So far as my limited investigation has revealed the history of the mining of coal in England, it does not sustain this charge, even if, in view of the reasonable and just principles upon which these decisions rest, as viewed in the light of present conditions, it merited any remark or attention. In most of the cases reported, the title, disclosing rank and fortune, is prefixed to the name of the defendant and not to the name of the plaintiff who brings the action for injury to his surface.

POFFENBARGER, JUDGE, (*dissenting*), *Additional Opinion.*

Since the decision of this case and the filing of a petition for rehearing, my associate, JUDGE COX, has prepared another opinion, setting forth the principles which, in the opinion of the majority of the Court, govern the construction of deeds of the class to which the one under consideration belongs, and stating their conclusion. My former opinion dealt with the case as disposed of by the opinion prepared by JUDGE MCWHORTER, embodying the opinion of Judge Mason of the circuit court. As the new opinion of the majority of the Court states a foundation for their conclusion, somewhat at variance with the views of Judge Mason, and presents propositions not raised or discussed at the time of the preparation and filing of my dissenting opinion, I feel it my

duty to express the reasons and grounds of my dissent from the views stated in the new opinion.

I took the position in my former opinion that the rule of construction which, in case of ambiguity in a deed, requires that the doubt be resolved against the grantor, is only applicable when, after the application of all other rules of construction, a doubt as to the intention of the parties still remains. This seems to be rather acquiesced in, and yet, for some reason, it is said that this rule has been strengthened, extended, or accentuated by section 2 of chapter 72 of the Code of 1899. It is true that Professor Minor, in the second volume of his work, at page 918, says this statute seems to be designed to carry this rule further than did the common law, But he frankly admits that there is no judicial determination to that effect. It is merely an idea of his own, not emanating from any court. With all due respect to the great learning and ability of Professor Minor, I am bound to express my unwillingness to accept his opinion. I do not feel at liberty to engraft upon the law so important a change upon a mere conclusion of this kind without any authority to support it, and, worse yet, without any statement of the process of reasoning by which it is reached. Furthermore, the language of Professor Minor has not, in this instance, the accuracy and preciseness which usually characterize his statements. He quotes the statute as if it said "every deed conveying lands shall," &c. This is not the language of the statute. Its language is "every such deed, conveying lands," shall etc. It follows section one of chapter 72 which prescribes a simple form of deed to take the place of the cumbersome and verbose instruments by which lands were anciently conveyed. Section 2 then says "Every such deed, conveying lands, shall unless an exception be made, be construed to include all the estate, right, title and interest whatever, both at common law and in equity, of the grantor, in and to such lands." The purpose of the two sections was to dispense with the common law requirements of a deed essential to the passing of the whole estate, or highest estate that a man could have, or may have, in a tract of land, or any other estate, title, or interest, without describing it. If he had less than a fee simple title, such a deed would pass it. If he had only an easement in it, such

a deed would pass that interest. The statute simply enables the grantor to pass any interest or estate he may have in a tract of land by executing a deed purporting to convey the whole of the estate. That is its purpose and its only purpose. How could this statute have any application to a deed which does not purport to pass the whole of a tract of land without exception?

By its very terms, it is only applicable when the deed conveys all of a tract without exception or reservation. When it does not purport to convey the whole tract, but reserves a portion of an estate or interest in a tract, or grants only a certain estate or interest in, or portion of, a tract, how could this statute have any application? It is generally in such deeds and contracts only that rules of construction have to be used and this statute has no application to such deeds. If it is claimed that a deed, uncertain in its terms, does pass the grantor's title, or title to the land claimed under it, said section 2 has no application. It applies to nothing except a deed in form or effect like the deed prescribed in the preceding section. Hence, it is beyond my power to see how it can be deemed to have, in any way, strengthened, extended, or affected the rule of construction in question.

Upon further investigation, I have reached the conclusion that this rule of construction is wholly inapplicable, under any circumstances, in determining whether a deed or contract granting or reserving coal and mining rights, shall have the effect of authorizing the mine owner to injure the surface, belonging to another person, by destroyiug its support. In the opinion prepared by JUDGE COX, Macswinney on Mines, page 340, is quoted as stating the following to be the principle governing such deeds, deduced from the language of the decisions: "Where it appears, from the express words of such instrument, or by clear intendment therefrom, that it was the intention to exclude the right, effect will be given to such intention." This is the most liberal rule that can be extracted from the authorities, the most liberal rule stated by Macswinney. It says in effect, in order to deprive the surface owner of the right of support, the deed must do it by express words or by clear intendment. If the language must be such as to make the in-

tent clear, what room is there for the application of the rule prescribed for the government of cases of doubt? Mr. Macswinney's tenth rule given on page 341 says: "Where the right has not been expressly excluded, or where the intention to exclude it is doubtful, the principle formerly mentioned—that the owner of land in its natural state is entitled, *prima facie*, to support, lateral as well as vertical; and that in whichever way the severance is effected, whether by a grant of the land, excepting the mines, or by a grant of the land (whether in fee simple, or for a term of years,) excepting the surface;—is applicable in favor of the contention, that the right has been granted or reserved by implication." It has been suggested that the doubt referred to in Macswinney's rule 10 is a doubt remaining after the deed has been tested by all the rules of construction, including the rule that an ambiguous deed is to be taken most strongly against the grantor. To this view, I cannot accede, for the reason that this rule is applicable only in cases of doubt. It does not make a doubtful deed plain. After its application, the deed is not plain as construed by the rules of law. It is still a doubtful deed on its face, and the law says, not that it is plain, or shall be deemed to be plain and unambiguous, but that, *although doubtful on the question of intent*, the thing in question shall pass by it. This law was prescribed for, and is applicable to, instruments, disclosing doubt as to the intent of the parties, not instruments showing plain intent, nor for the purpose of making doubtful instruments plain, but only to make a doubtful instrument pass a right of title, *non constat* the doubt. Mr. Macswinney does not state this principle in any such sense as is claimed. When does he say "the principle formerly mentioned" shall control? The answer, in his own language, is "Where the right has not been expressly excluded, or where the intention to exclude it is doubtful." How are we to take this language? Shall we engraft upon it something that the author has not put into it? If so, why? Upon what ground can this be done? It will appear in a subsequent part of this opinion that no decision of the English courts, with a single possible exception, to be noticed, has ever given the benefit of the doubt on the question of intent to the mine owner or lessee. It will be further shown that no decision of the English courts, with

one possible exception, has ever allowed a deed to take away the right of support from the surface by any implication, except a necessary one. The language in every instance was such that it could not be given force and effect without allowing it to deprive the surface of its support. In at least one case, as shown in my former opinion, words of minor importance, irreconcilable with any other view, were absolutely discarded as being repugnant, and deprived of any effect, because their immediate context was such as to make it plain, upon a view of the whole instrument, that the parties did not intend them to have such effect, or, at least, as to raise a doubt as to what they intended.

I turn now to another proposition, deemed by my associates to be important and controlling in the construction of this deed. I am unable to see how the nature of the tenure to the right of support can have such effect. *Harris* v. *Ryding*, 5 M. & W. 59, and *Humphreys* v. *Brogden*, 12 Q. B. 739, decided, respectively, in 1839 and 1850, started with the view that, where the coal is granted and the surface retained, or where the surface is owned by one person and the minerals by another, and nothing further appears, respecting the rights of the parties, the owner of the surface has, by implied reservation, a right of support which the owner of the coal cannot destroy; and where the surface has been granted and the coal retained, and nothing further appears in the dead, the grantor is deemed to have granted the right of support along with the surface, without express words to that effect. In the first instance, it is a reservation in derogation of the grant. In the other, it is a grant in derogation of the reservation, if we treat the right as an easement, resting on the coal. When no title papers appeared showing how the severance had taken place, it was presumed that the estate had been severed into two parts in such manner as to confer the right of support either by grant or reservation as aforesaid. Lord Campbell said, in *Humphreys* v. *Brogden*, "If the owner of the entirety is supposed to have alienated the surface, reserving the minerals, he cannot be presumed to have reserved to himself, in derogation of his grant, the power of removing all the minerals without leaving a support for the surface; and

if he is supposed to have alienated the minerals, reserving the surface, he cannot be presumed to have parted with the right to that support for the surface by the minerals which it had ever before enjoyed." The first proposition says, in effect, in granting the surface, the grantor is presumed to have granted the surface in its natural condition and state, for otherwise he would have made a resevation in derogation of his grant. The second says, in substance, that, when granting the minerals, he cannot be presumed to have parted with the support of the surface, which he reserved to himself, because the surface, without the support, would not be the surface in truth and in fact. It is not strange that Lord Campbell should have stated these propositions in a case in which no deeds were shown, and it did not appear how the severance occurred, for he had before him the earlier case of *Harris* v. *Ryding*, in which the deed of severance did appear and had been construed. It was a deed granting the coal and reserving the surface. Therefore, it presented the strong case of a reservation to the grantor of a right which stood in the way of his grantee and impaired the value of the thing granted. The court held in *Harris* v. *Ryding* that a deed should not be so construed as to take away the right of support, even when it granted the minerals, reserving the surface, in the absence of language conferring, upon the grantee of the minerals, the right to destroy the surface. Such being the true construction of a deed of that kind, the court very consistently said in the later case, showing nothing except ownership of the surface by one person, and of the coal by another, that there could be no presumption that the deed or other instrument by which the severance had been made contained terms which took away the right of subjacent support. Still later, in *Rowbotham* v. *Wilson*, 6 E. & B. 593, decided in 1856, Lord Campbell, delivering the opinion, the doctrine laid down in *Humphreys* v. *Brogden* was adhered to, but it was found that the deed in that case was such as to take away the right of support. This decision was in the court of Queen's Bench. The case was appealed and heard in the Exchequer Chamber in 1857, when Lord Campbell's decision was affirmed. It was here that a different view from that held by Lord Campbell, as to the nature of the tenure of

the right of support, was suggested. Watson, Baron, said that the provision of that deed by which the surface owner had given away his right of support should be treated and regarded as a covenant not to sue for damage to the surface. He said: "No doubt these words might operate as a grant, if the subject-matter was capable of a grant. But I am of opinion it could not be the subject-matter of a grant. * * * To be the subject-matter of a grant, it must be an easement to be imposed on the corporeal property of the grantor. * * * The present claim is not anlogous to that of lights; for this, as nothing is to be done on or over the plaintiff's land, but only in the event of surface injury from works, is a covenant not to sue." Bramwell, Baron, said: "Now I think it inaccurate to say that the plaintiff is claiming any kind of easement, qualified or otherwise; an easement seeming to me to be something additional to the ordinary rights of property. I think the plaintiff is merely claiming the common right not to be injured in his property by the way in which another uses his." Martin, Baron, after expressing similar views in different form, said: "I think these are the true legal grounds upon which this case rests, and not upon the principle applicable to easements and servitudes; as, in my opinion, the general right which a man *prima facie* has at common law to the support of his land, either subjacent or adjacent, is a natural right analogous to the right of flowing water; and not an easement." Williams, J., said: "It is, I apprehend, in its nature, one of the ordinary rights of property, and not an easement, which is a right accessorial to those ordinary rights." Cresswell, J., said: "Howlette had a right to the mines, and to use them as he pleased, provided he did not, by so using them, injure the property of Pears. And that right of Pears to sue for an injury done to his land was a right given to him by the common law, as owner of that land, and not as being entitled to any easement in or over the mines below it. An easement must be an interest in or over the soil; but the owner of the mines might have removed every atom of the minerals without being liable to an action if the soil above had not fallen." In 1858, *Bonomi* v. *Backhouse*, E. B. & E. 622, was decided in the Court of Queen's Bench, Lord Campbell,

C. J.. participating. The question in that case was, when the statute of limitations begins to run for an injury done to the surface. In it, Lord Campbell said: "I agree in the opinion that the right of support which the plaintiff claims is a natural right of property, to be presumed till (as in *Rowbotham* v. *Wilson*, 8 E. & B. 123, E. C. L. R. vol. 92), evidence is given to rebut the presumption; and that such a right is not to be considered an easement or servitude arising from grant." Wightman, Coleridge and Earle, Judges, were all of the same opinion. *Rowbotham* v. *Wilson* went to the House of Lords on appeal and was there decided in 1860, Lords Wensleydale and Chelmsford delivering opinions, both of whom expressed themselves as satisfied with the views expressed in *Bonomi* v. *Backhouse*, concerning the nature of the right. In 1861, *Bonomi* v. *Backhouse* was finally disposed of in the House of Lords, where the following was announced as law: "The right of a person to the support of the land immediately around his house is not in the nature of an easement, but is the ordinary right of enjoyment of property." The injury to the property in that case was the result of the breaking down of the surface over a mine on an adjacent tract of land; but it was agreed that the same principles governed as in the case of a letting down of the surface by mining operations immediately under it. That case did not determine the principle upon which the right of subjacent support is parted with, whether by grant or othrewise. It was not necessary to do so. There was no pretention that it had been lost. The only defense was the statute of limitations.

When writing my former opinion, I did not regard this new view concerning the nature and origin of the right of support as having any important bearing upon the concrete question presented by this record. Upon reflection, however, I have come to the conclusion that, if it has any such effect, it is an element of strength in the conclusion to which I have come rather than of weakness. It says the right of support is part and parcel of the surface, a property right, naturally incident to the surface, recognized by law as belonging to the surface, and never to be regarded, in law, as having been parted with, unless it clearly appears to have been granted away. It no longer stands upon the questiona-

ble presumption of a reservation in a deed in derogation of the grant made by that deed, or as an implied addition to the thing granted. This change elevates it to the impregnable position of a property right belonging to the surface, and going with the surface whenever the surface is granted or reserved. The first theory treated it as an easement, not naturally belonging to the surface, but as rather belonging to the coal, a right of property incident, and belonging, to the coal, and carved out of it and annexed to the surface by the grant or reservation. The new view makes it doubly and unqestionably a part of the surface.

My associates say, in their new opinion, that this ascertainment of the exact nature of the right of support affords more solid ground for the position that it may be parted with otherwise than by an express grant or the equivalent thereof. In other words, that it may be lost or released by mere implication not necessary. As it is not an easement annexed to the surface and operating as a servitude upon the coal, but is a part of the surface, an invasion or disturbance of that right merely gives a right of action, just as any other wrongful act, wherefore, on the principle that a man cannot sue for damages consequent upon the performance of an act to which he has consented, a grant of the right to remove all the coal estops the grantor from recovering damages for the injury resulting to his land. They say that, if it were an easement, annexed to the surface by grant or reservation, there would be more reason for saying it could be parted with only by express words or necessary implication. This view impresses me as confusing the right in question with the remedy for redressing a wrong to that right. If it is an easement annexed to the surface, an obstruction thereof or injury thereto would be remediable by an action for damages. If it is a natural right of property incident to the surface, an injury thereto is remediable in like manner. Permission to inflict the injury by a disturbance of this right would bar an action as effectually in the one case as in the other. If a man consent orally to the mining and hauling away of his coal by another who has not a shadow of title to it, there would be no right of action against him as for a wrong. The taking of the coal would not be a trespass. So, if a man permit any other act to be done to the detriment of his real property,

no matter by what right he holds, he cannot complain of it as a wrongful act. If such act be done without permission, it is a mere trespass and does not in any way affect the estate, although the party is liable in damages for the wrong done. These are acts which do not, in any way, affect or destroy the title or estate of the owner. They merely injure and damage the property. They may be done to an easement or other appurtenance of the property as well as to the corpus. But they are only wrongful acts when not done by consent or permission of the owner. But when the act is done, not as a trespass, admitting title in the owner, nor by his consent and permission, but as a rightful act, and the defense to the action brought for the injury is based upon a claim of title and right of the defendant to do it, then the issue becomes one of title, of right, of estate. A mere permission is revocable at any time and any further injury done after the revocation gives a right of action for damages. The previous permission, which had been revoked, constitutes no bar to it. I imagine that the defendant in this case would be unwilling to say that its rights to remove the support now existing under the surface of the plaintiff's land depends merely upon the will and pleasure of the plaintiff, and that his revocation of the permission expressed in the deed to do the injury, if it be such, will put an end to its right to effect further damage to the surface. If it be only a valid personal covenant, a breach of it would only give a right of action for damages. Its contention is not that it has inflicted an injury upon the plaintiff's property by an act to which the plaintiff consented, in consequence of which he cannot bring an action for the resulting damages, but that the plaintiff has no right of support, because he has parted with it by his deed—that the surface is a servient estate to the coal—that the deed imposed a servitude upon the surface in favor of the coal. The contention is that this right, be it easement or natural right, has been bargained, sold and conveyed away by the plaintiff and is no longer his property, in consequence of which he cannot prevent further injury to his surface by revoking his consent.

In *Rowbotham* v. *Wilson*, 8 E. & B. 122, Watson, Baron, and Cresswell, Judge, in the court of Exchequer Chamber, took for their position the view thus adopted by the majority

in the new opinion. They said the clause by which the owner of the surface parted with his right of support operated as a covenant not to sue, nothing more nor less. The surface had passed out of the hands of the man who made that covenant and had come into the hands of the plaintiff; and, as such a covenant does not run with the land, so as to bind subsequent purchasers, they said the plaintiff might recover, notwithstanding the deed of severance had released the right of support. But Barons Bramwell and Martin and Judges Williams and Crowder, constituting the balance of the court, were of a different opinion. They refused to accept this view. They said it operated either as a covenant running with the land and affecting the estate itself, or as a grant of a right in and to the land. When the case went to the House of Lords and was there affirmed, that final decision again repudiated this doctrine of a mere personal covenant and it was held solemnly that it "operated as a grant of a right to disturb the surface of the land."

The idea of estoppel asserted by the opinion of the majority of the Court, as a principle to be applied in construing deeds, severing the minerals from the surface, in determining whether the right of support has been relinquished, is the proposition upon which *Eadon* v. *Jeffcock*, L. R. 7 Exch. 379, seems to partially stand. Whether it is the real basis of the decision may well be doubted, since the court was composed of six judges, three of whom delivered opinions, and only two of these three placed their decisions upon that ground, namely, Barons Martin and Cleasby. It is not the ground upon which Bramwell, Baron, concurred in the decision of the case. He merely commented upon the position of the other two judges and looked upon their argument as plausible. He refused and declined to accept it, because it was, in his opinion, contrary to every other decision which any English court had ever rendered. He expressly denied that the authorities, relied upon for it by Barons Cleasby and Martin, could be so construed. These cases were *Taylor* v. *Shafto*, 8 B. & S. 228, and *Shafto* v. *Johnson*, 8 B. & S. 252, and his interpretation of both was that, by the leases, the lessors of the mines had bound the lessees by covenant to do what was inconsistent with leaving support for the surface, and quoted from the opinion of the vice-chancellor to

prove his statement. Those leases did not merely permit, or authorize, the removal of all the coal, but absolutely bound the lessees, by covenants in the leases, to do so. These covenants raised not a mere implication by probability, not a mere doubtful implication, that the support of the surface might be destroyed, but, on the contrary, a necessary and inevitable one. It must result, else the covenant could not be performed. It must result, else the deed could not have effect according to either its spirit or its terms. His interpretation of these cases corresponds with that of Macswinney, who, analyzing *Shafto* v. *Johnson*, says: "It was considered, that the leading features of the lease were (1) the intention, in preference to everything else, to provide for the safety of the mine; and (2) the covenant (not by way of privilege to the lessees, but by way of positive obligation upon them, and for the benefit of the lessor) to get all the coal, which could be got with safety to the mine." Macswinney on Mines 323. Having thus put aside the views of his associates, as absolutely devoid of authority for their support, Baron Bramwell found another ground upon which to rest the decision of the court. That was this: The lease bore date 1840 and contained the provisions upon which Barons Martin and Cleasby came to their conclusions. They considered nothing else. From the terms of this lease it was possible to infer that there was an intent that the pillars might be removed. Later, in 1857, the land on which the operations were carried on under the lease was conveyed to persons from whom the plaintiffs took their title, with notice of the provisions of that deed. The deed reserved the bed of mines covered by the lease, together with power to the grantor, his heirs or assigns, to be exercised from and after the expiration of the term, for carrying on the works of the mine and carrying away the fireclay so reserved. It also reserved to the grantor the coal rent under the lease of 1840. It provided for rent for the land used and occupied by the grantor for the purposes of the mine and for compensation for buildings required or removed for that purpose and for surface damage to the land. It further provided specially that the grantor, his heirs or assigns, tenants or lessees, *should not be liable for any damage caused to buildings* which should thereafter be erected on the land conveyed, *by*

the sinking of the land through mining operations in getting the coal, clay, stone and other minerals hereby excepted and removed. It was upon this that Baron Bramwell based his concurrence in the decision in favor of the defendants. His position is best stated in his own language, which is as follows: "And it was contended by the defendants, that by this conveyance the grantees took without a right to support for houses built over the mines, and without a right to recover damages for injury to houses arising from the surface being let down by mining operations. This undoubtedly is so, if those mining operations were carried on by Roberts, or by his lessees, under leases granted subsequently to the conveyance to the plaintiffs. But it was said by the plaintiffs not to apply to the defendants, who were lessees at the time of the conveyance to the plaintiffs. I think it does. The lease of June, 1840, under which the defendants have the right to work, is mentioned in the conveyance to the plaintiffs, and the words are general and unqualified: 'Roberts, his heirs or assigns, tenants or lessees, shall not be responsible for damages caused to dwellings which shall hereafter be erected,' by mining operations. And it is clear that as the mines and the reversion to the mines were separated from the rest of the soil, Roberts covenants with the plaintiffs for the performance of the same matters for the benefit of the surface owners that the lessees had covenanted with Sotheron to perform for their benefit. And it is also clear that a power of distress which is given to the plaintiffs, would enable them to distrain on the defendants' goods. It is asked, why are the defendants to have the benefit of an arrangement to which they are not party or privy? The answer is, that the very foundation of the plaintiffs' case is a right to support as against the defendants, and if the plaintiffs have taken their estate without that right the defendants incidentally get a benefit perhaps not contemplated." The case seems never to have been appealed, and what the position of the court of last resort would have been, nobody can say. Nor can it be determined upon which ground the decision rests, for only three of the judges out of six have spoken. As two grounds, barring the right of recovery, were stated, one of which seemed to be clearly sufficient, the plaintiff no doubt considered an appeal useless, and

so this anomalous and mysterious decision remains. An element which entered largely into that case was a supposed radical distinction between a lease of coal and a conveyance thereof. As a lessor always receives royalty, the working of the mine is partly for his benefit, while the working of a mine which has been sold and conveyed absolutely is not for the benefit of the owner of the surface. It seems to have been supposed by Barons Cleasby and Martin that the mere fact that the instrument governing the rights of the parties was a lease, was sufficient to show intent that the surface might be let down by mining operations under it. This erroneous view was utterly demolished in *Davis* v. *Treharne*, 6 App. Cas. 460, decided by the House of Lords. Macswinney on Mines, page 297, says: "According to this decision, it does not follow from the mere facts of a lease having been granted and a royalty reserved thereunder, that there is not a right of support. Those facts may be elements to be taken into consideration, in seeing whether or not the right is taken away. But they are not sufficient of themselves to decide that question." *Eadon* v. *Jeffcock* has never been expressly overruled, it is true, but it is undoubtedly the only case of its kind, as regards the proposition, that mere permission to remove all the coal, sufficiently discloses intent to relinquish the right of support of the surface. Moreover, there enters into it the circumstance, that the paper construed was a lease under which the mines were worked on account of the owner of the surface, and not a deed conveying title, in consequence of which benefit from the work inured to the surface owner, the real owner of the mine. In this case, the rights of the parties are fixed by a deed and not a lease. When the works are carried on under a lease, there is some plausible ground for saying the construction should be more liberal to the lessee, because, in one sense, the operations, resulting in injury to the surface, are carried on in part by the owner of the surface himself, for he causes it to be done for his own benefit. He injures his own property for his own benefit. Whatever force there is in this view, and whatever effect it may have had in the decision of *Eadon* v. *Jeffcock*, and it is conceded that it had some, and more than it could have under the later decisions, it can have none here. Therefore, I cannot see

that *Eadon* v. *Jeffcock* is any authority for the position taken by the majority of this Court.

Davis v. *Treharne*, 6 App. Cas. 460, was another case involving the construction of a lease, and foundation for the position of the majority is sought in certain language quoted from the opinion of Lord Blackburn therein. We must consider all his language, and do it in the light of the lease he was discussing. I think his meaning was that the words "letting down the surface" should qualify both sentences "You may take all the minerals." And "you must take away all the minerals." The lease did expressly give the right to take away all the minerals, but it gave no right to let down the surface. It did not say the lessee had the right to mine, excavate and remove all the coal, it is true, but it did demise the veins, mines and seams of coal, ironstone and blackband, with power to the lessee to enter into and upon certain portions of the land and to open, get and carry away the said veins, mines, &c. No words limited the extent to which the lessee could carry them away and the general language used clearly covers all. This is the sense of it, the meaning of it. Moreover, there was a clause in the lease which required the lessee at the end of the term to "compensate the said lessor for any *damage or injury done to the surface of the said farm and lands.*" Not only did it authorize the mining and taking away of all the minerals, but it contained, in addition thereto, an express reference to injury and damage to the surface and provided for compensation. But it did not expressly say, or use any language which necessarily meant that the surface might be let down. It was the absence of this that decided the case in Lord Blackburn's mind, as is shown by the language quoted from him in the majority opinion. Proceeding, he said: "And when I come to look at the documents, though one is more ready, it being a lease, to believe that the parties meant to say, You shall take all the minerals letting down the surface, than one would have been if it was a sale or a reservation of minerals below to be taken out some future time, I cannot agree with what seems to have been said (I do not know whether that was what was meant) by Baron Cleasby in the case of *Eadon* v. *Jeffcock*. I cannot agree that it follows from that that there is not a right of support. I think

the right of support exists unless it is taken away. I think the fact that it is a lease may be one of the elements to be taken into consideration in seeing whether it is taken away or not, but that is not enough of itself to decide that question. My Lords, looking at these two documents, I cannot find anything that takes away that right of support. It is quite true that where parties have agreed in this way, you shall make compensation for whatever injury you do in respect of these rights, and amongst other things you shall make compensation for what you do in letting down the surface, the conclusion is very strong from that that the lessor says, You may let down the surface. I do not say that it is conclusive, but it is a very strong argument, if you find that clause, to say that he did mean that the lessee might let down the surface. But when you find it said, as it is here, that he shall do certain things underground and a great many things upon the surface, and afterwards make compensation (as it is said in the lease) 'for all damage occasioned by the exercise of the rights hereby reserved' or (as it is said in the lease) shall at the end of the lease 'compensate the lessor for any damage or injury done to the surface of the said farms and lands' (that means any damage done to the surface of the said farms and lands in the exercise of the rights previously given), and when we find that those rights do include a great many things which will necessarily damage the surface, the reasonable conclusion is that the meaning is that there is to be compensation for things done in the exercise of those rights. I cannot see that that affords any argument whatever for saying that the lessor intended that the lessee should be able to do something more, and let down the surface. Yet that is really the whole argument; it stands upon that; that because a clause saying, you shall make compensation for letting down the surface is a strong argument for saying you may let down the surface, therefore a clause saying you shall make compensation for damage done to the surface affords a strong argument for saying that the lessee might let down the surface. I cannot see that. It does not seem to me to be any argument at all." In the face of this language, how is it possible to conceive that he meant that a mere grant of permission to take away all the minerals would amount to a relinquishment of support? Why, he admits that the lease

said more than that. It said all that, and, in addition thereto, that if damage should result, compensation for the injury must be made. But he said even all that stopped short of making the letting down of the surface rightful. Taking all his language together, it is absolutely clear that he meant to say that a permission to take away all the minerals, letting down the surface, or an obligation to take all the minerals, letting down the surface, would amount to a relinquishment of the right of support. He makes it plain that the intent to be looked for and to be ascertained is, not that the coal may be removed or must be removed, but that the surface may be let down. Hence the phrase, "letting down the surface," must qualify both of the preceding sentences, not merely the latter. This case was decided in 1881, and the general impression is that it wholly repudiates the doctrine propounded by Barons Cleasby and Martin, and, to my mind, it seems impossible that there could be a doubt about this. If anything further were required to make this plain, it would be found in the opinion of Lord Watson, in the same case: "When a proprietor of the surface and the subjacent strata grants a lease of the whole or part of his minerals to a tenant, I think it is an implied term of that contract that support shall be given in the course of working to the surface of the land. If it is not intended that that right should be reserved, the parties must make it *very clear upon the face of their contract;* in other words, they must express their intention *so clearly as to enable a Court to say that such intention is plain.* I think that rule was laid down by the late Lord Justice Mellish in the case of *Hext* v. *Gill*, and I quite agree with that ruling. It may be done in express terms; but of course it is not necessary that express language must be used; for it may appear by a plain implication from other clauses of the deed, as in the case of *Taylor* v. *Shafto*, where an obligation was laid upon the tenant to perform certain acts which were plainly inconsistent with supporting the surface."

If it be conceded that the lease in *Eadon* v. *Jeffcock* disclosed nothing more, bearing on the intent of the parties, than that it gave permission to remove all the coal, there is nothing in any of the opinions delivered in the case to show or indicate that the liberality of that view stands upon the

altered opinion as to the nature of the right of support. The distinction between an easement and a right of property is not mentioned or adverted to in any of the opinions. That case, even if it be authority for anything else, affords no ground for saying the right of support may be relinquished by a covenant or a grant less certain in its terms and direct in its effect, than under the early doctrine, because the right of support is a natural right incident to the surface, and not an easement. The English judges did not regard the nature of the right of support as important in construing the instrument of severance with a view of determining whether the right was cut off by it. In *Rowbotham* v. *Wilson*, 8 E. & B. 145, Bramwell, Baron, said: "Now I think it inaccurate to say that the plaintiff is claiming any kind of easement, qualified or otherwise; an easement seeming to me to be something additional to the ordinary right of property. I think the plaintiff is merely claiming the common right not to be injured in his property by the way in which another uses his. But I do not think it necessary to determine this; for I think that, whether the defendant is entitled to the mines as a separate tenement, whether the space they occupied belonged to him, or whether he has a grant of the minerals and a license to take them, or whether the right of the surface or general owner to support from the mines below is a natural territorial right or an easement absolute or qualified, or whether the right to sink pits and cause subsidence is a natural incident of a grant of the mines or license to take them, the defendant is entitled to judgment." Lord Campbell did not think it made any difference. In *Bonomi* v. *Backhouse*, E. B. & E. 622, 643, he said: "I agree in the opinion that the right of support which the plaintiffs claim is a natural right of property. * * * But the consequence does not seem to me to follow that the Statute of Limitations cannot begin to run for an injury to such a right till there has been an actual subsidence of the surface. * * * *The present appears to me to be an action for injury to a right, and not merely for what is called consequential damage.*"

The later decisions of the English court, rendered in view of all that was said in *Bonomi* v. *Backhouse*, *Rowbotham* v. *Wilson*, *Eadon* v. *Jeffcock* and *Treharne* v. *Davis*, all say that language, sufficient to relinquish the right of support,

must amount to a grant of the right to disturb the surface or the equivalent thereof. It must rise to the dignity of a positive grant of a property right in the surface. It must touch in direct language the subject matter of the grant. It is not enough to grant the right to do something with the coal. It is not of the surface. Language touching it only does not reach the subject matter of the grant affecting the surface. The deed must grant part of the surface. How can it do that without any reference to the surface? That it must amount to a grant or an equivalent assurance is made plain by the later decisions. *Bell* v. *Love*, 10 Q. B. D. 547, decided in 1883, arose under an Inclosure Act, as did *Rowbotham* v. *Wilson*, and makes it plain that the nature of the right is unimportant, and also that a provision releasing the right of support must be a grant or the equivalent thereof. This case was decided long after that question was settled, and though it arose under an Inclosure Act, the same principles control as in other cases. In that case, Baggalay, L. J., used this language: "In every case, however, in which the owner of the minerals claims any rights in respect of getting them in excess of, or other than, the *prima facia* right of getting them without causing injury to the owner of the surface, the origin and the nature of such rights *must be clearly defined by some grant or equivalent assurance;* in the absence of which the presumption is in favour of the right of the owner of the surface to support." Lindley, L. J., delivering an opinion in the same case, after referring to *Rowbotham* v. *Wilson*, *Smith* v. *Darby*, *Duke of Buccleugh* v. *Wakefield*, *Aspden* v. *Seddon*, *Gill* v. *Dickinson*, *Smith* v. *Haines*, *Blackett* v. *Bradley*, and *Hext* v. *Gill*, said: "These cases appear to me to establish two propositions, viz., first, that an Inclosure Act is not to be construed so as to allow the lord of the manor to let down the surface of allotments by working mines under them unless the language of the Act is clearly and unmistakably to that effect; and, secondly, that the absence of all provision for compensation for injury sustained by letting down the surface tends strongly to indicate that the legislature did not intend by general words to reserve or to confer upon the lord of the manor the right to work his mines so as to let the surface down." These views have the high approval of Lord Coleridge, Chief Justice of England, for Bag-

galay, L. J., in concluding his opinion, says: "I have the authority of Lord Coleridge, C. J., who heard the argument, to say that he agrees in the conclusion at which I have arrived; *he agrees also with the substance of my judgment, and he thinks it unnecessary to write a judgment of his own.*" By judgment here, he means what we call an opinion. These authorities most effectually do away with the view that the right of support can be parted with otherwise than by a grant or an equivelant assurance, notwithstanding the conclusion that it is a natural right of property and not an easement. The question presented in this case has a double aspect, one of right, the other of remedy. They must not be confused. We must not lose sight of the question of estate by fixing our eyes on that of the remedy for redressing a wrong done to it. In *Dixon* v. *White*, 8 App. Cas. 833, decided in 1883, Lord Blackburn said: "Lord Mure is reported as saying in this case, 'that nothing but the most express terms,' would entitle the court to hold that the proprietors of the surface have accepted them under a contract to give up the right of support. I think that is going further than I should like to follow. But I think that the burden is on those who say there is such a contract, to show that there is an intention to that effect appearing on the face of the titles." In the same case, Lord Watson said. "If A. conveys minerals to B., reserving the property of the surface; or if A. conveys the surface to B., reserving the property of the minerals below it, A. in the one case retains, and B. in the other gets, a right to have the surface supported, unless the contrary shall be expressly provided, or shall appear by plain implication from the terms of the conveyance." Lord Fitz-Gerald said, in the same case: "If the owner of the minerals, on the other hand, alleges that he has not only the property in the whole minerals, but has also retained all proper means to make that property available, and amongst them a right to get and remove the whole, although in doing so he may destroy the surface by removing its necessary supports, then he must show by his title that he had such a right." The law as stated by Baggalay, L. J., in *Bell* v. *Love*, in 1883, was accepted as the settled law of England in 1889, in *Consett Water Works Co.* v. *Ritson*, 22 Q. B. D. 318. This was six years later than *Dixon* v. *White* and adopted the opinions

in *Bell* v. *Love* and *Treharne* v. *Davis* as true expositions of the law. See opinion at page 321. In *Greenwell* v. *Coal Co.*, 2 Q. B. (1897) 165, *Davis* v. *Treharne* was followed as correct law. In none of these late cases is *Eadon* v. *Jeffcock* referred to or considered. It seems to have dropped almost wholly out of view. All of them are to the effect that it is a question of title to be established by the mine owner or lessee to an interest in the surface and not a mere question of estoppel. Nor did any of them treat the change of opinion as to the nature of the right as having any bearing whatever upon the construction of the deed or lease. Its principal effect seems to have related to pleading and evidence. In *Dixon* v. *White*, Lord Blackburn said, speaking of the right of support and the right of mining: "Those rights are given (to use a phrase familiar to pleaders of the old school in England, but not to Scotch lawyers) 'of common right,' that is, when it is established that the upper and lower strata are in different hands, it is not necessary either in pleading to allege, or in evidence prove, any special origin for those rights, the burden both in pleading and in proof is on those who assert that the rights are different from those existing as of common right."

Since at no time does it appear that the nature and origin of the right of support was deemed to have any effect upon the question of construction, and the requirement that he who claims the right to deprive the surface of its support must show title in himself as his warrant for such action, such as a grant of the right to let down the surface, or a covenant imposed upon the surface, running with it, binding the land in the hands of subsequent alienees, and operating as a grant of title, it seems to me that all of the early doctrine of the English courts, asserted in *Harris* v. *Ryding* and *Humphreys* v. *Brogden*, that is material to, or has any bearing upon, the question presented by this record, is firmly adhered to at the present time by the English courts. If the case of *Eadon* v. *Jeffcock* may be deemed to have indicated a variance from the line of those early decisions, the loose doctrine propounded by that case has been clearly repudiated and overthrown by the later decisions and is no longer authority for any proposition, except that the fact that the mines are operated under a lease, and not under a deed, is an element to be

considered in construing the lease for ascertainment of the intent. On that question it may be still cited as authority and properly so. At the present time it can be safely said that there is no impairment of the early English doctrine upon this subject, either in England or any place else. It was at one time threatened in England, but the case which seemed to put it in danger was quickly and effectually condemned in *Davis* v. *Treharne*, and since that time, there has been no deviation in the same direction or along any other line variant from the principles of the early cases, as to any subject or proposition that enters into the disposition of this case.

The length of this opinion, the limit upon my time and the breadth of the great field of the law of estoppel, forbid any attempt at an extensive exposition of the principles of that law, in an effort to determine whether its application, as made in this case, is consistent with those principles. For my part, I am content with the knowledge that no other court has ever professedly rested its decision upon principles of that law in a case of this kind. I feel impelled, however, to say that the application of that principle here places the parties in an anomalous situation. It admits that the right of support belongs to the plaintiff in this case. He has not granted it. He is only precluded from recovering damages for a wrong done to his own property. This is a presumption raised by the Court in order to work out the conclusion to which it has come. It says the plaintiff must have intended this else he would not have consented. There is law for the position that the court cannot indulge in any presumption that a man has consented to an unlawful act. For this we need look no further than the great case of *Davis* v. *Treharne*, relied upon in the opinion of the majority, and later in date than *Eadon* v. *Jeffcock*. The lease provided that the seams and veins of coal should be worked "in the usual and and most approved way in which the same is performed in other works of the like kind in the county of Glamorgan." By the usual and most approved method of work in that county, the surface was let down. It was contended that the lease showed plain intent by reference to this custom to allow the surface to be let down. In the House of Lords, Lord Chancellor Selborne said in his opinion: "It is impossible

that those words 'the usual and most approved way of working in the county of Glamorgan' can have been intended to absolve the lessee from a legal obligation, collateral to the working of the mine. For this purpose it cannot make any difference, whether the question arises between a lessor who is owner of the surface, and his lessee, or between the lessee and a surface owner who is not lessor. Those words are equally apt, equally effectual, and have the same meaning, in each of those cases. They relate simply to the manner of working the mine for mining purposes; they have no reference to the right of other persons, which there could not possibly be any local custom in such a district as a county to disregard, and which must be respected in carrying on those works; they cannot be understood to have been meant by either of these parties to signify, that the working must be carried on as if there were no such rights of other persons, or of the lessor himself, which the lessee was bound to respect." Other judges have said the same thing. It was decided in a Pennsylvania case. I cannot take time to hunt them up. The application of this principle makes it necessary to indulge in the further presumption that this immunity from the consequences of an unlawful act is for a valuable consideration. As this case stands upon a demurrer to a declaration, without any averment on the subject of consideration, I am unable to see how the Court can accept as a truth the payment of any consideration. How can we look beyond the declaration? It may be that the deed itself imports a consideration for whatever is granted by it. But to assume that there was a consideration of any certain amount, or for the purpose of determining what the deed grants is an unheard of proposition. The recital of the consideration in a deed is wholly unimportant as regards its amount. In determining what has been granted, we must look to the terms of the deed. It cannot pass titles and rights upon mere presumption. They must pass by the terms of the instrument and the intent disclosed thereby. What the consideration was does not appear from this declaration. The usual and only correct way of construing the granting part of a deed is to look at its terms and the court never concerns itself about the consideration. There can be no presumption from the fact of consideration or the amount of consideration, in

determining what the language of the granting part of the deed means. How can this Court say what the coal, without the right to let down the surface, was worth, or what the coal, with the right to let down the surface, was worth? We know nothing about that and are not permitted to indulge in any presumptions. When is it that the court may presume that the surface owner has been compensated for the right to destroy the support of his surface? Mr. Macswinney answers, from the authorities, by saying it is when the mine owner is, by the terms of the deed, relieved from liability for damage. Macswinney on Mines 340. He does not say we may look to the consideration expressed in the deed to determine whether the mine owner is relieved from liability. On the other hand, he says the exact reverse of this. When, from the terms of the deed, it appears that the mine owner is relieved from liability, then it may be assumed that the surface owner was paid for that immunity. The decision in this case reverses the rule and the Court makes an assumption of payment of a consideration in order to strengthen the force and effect of the language upon which the defendant relies as a grant of the right to destroy the subjacent support. In all other courts when the deed, by its terms, gives the right to let down the surface, it is deemed that there has been a grant of a property right to the mine owner, the imposition of a servitude upon the estate of the surface owner for the benefit of the mine owner, and that the effect is to make the action of the mine owner in letting down the surface a rightful, lawful, act, in consequence of which no right of action arises. This decision makes it a wrongful, unlawful act and then bars recovery for the damages by the principle of estoppel. Another thing inconsistent with the principles of law is found in this, that the mere consent or permission operating by way of estoppel is revocable, as has been shown hereinbefore, except under peculiar circumstances, making it inequitable to allow a revocation, as where, on the face of it, large expenditures have been made, or the party has, in some other way, altered his position on the faith of it. But it may be revoked at any time before it is acted upon. Now, we must determine what this deed was at the time it was made. Its character has not been changed by lapse of time. No doubt, considerable time intervened be-

tween the execution of the deed and the beginning of operations under it. If it was a mere consent, a mere permission, and did not pass any estate in the land, then it was revocable and the grantor had it in his power under this deed to defeat the professed object of this clause. It was nothing more than a mere license, even if it rested upon a consideration. Being such, it was revocable, and, if revoked before it was acted upon, not even a court of equity would lend its aid to prevent a revocation of it. Suppose Griffin had revoked this license before the mines were opened. What would then have been the consequence? A mere right in Camden to recover back what he paid for it, if anything. Would any coal owner in this State, or would this defendant be satisfied with such a determination as to the character of the right? It may be that if a man consent to the building of a slaughter house or a factory by his neighbor on a lot adjoining his residence, and thereby induce him to lay out large sums of money in such work, he cannot, after the work is completed, compel him to abate that work as a nuisance. But having consented to it, in writing or otherwise, if, before the act is done, before any money has been laid out on the faith of it, he revoke that promise, or refuse to allow that to be done which he agreed to allow, the only remedy against him, if any, would be a personal action for the consideration. No court would compel him to specifically perform. It would give no right to burden his estate or his property with a servitude. In order to do that, it must rise to the dignity of a grant of a right in the property and amount to more than a mere license, or a covenant not to sue a man for something which he does on his own property. No such agreement can have any such effect. No covenant runs with the land unless it relates to, or is connected with, an interest in the land or estate transferred by the deed. There must be a privity of estate. "A covenant which may run with the land can do so only when there is a subsisting privity of estate between the covenantor and the covenantee, that, when the land itself, or some estate or interest therein, even though less than the entire title, to which the covenant may attach as its vehicle of conveyance, is transferred; if there is no privity of estate between the contracting parties, the assignee will not be bound by, nor have the benefit of, any covenants between the

the contracting parties, although they may relate to the land he takes by assignment or purchase from one of the parties to the contract. In such a case the covenants are personal and collateral to the land." 11 Cyc. 1081. If this be a covenant, it is unconnected with any grant of any part of the surface, and would not, for that reason, run with the land. Such a covenant would not amount to a license to do anything upon the covenantor's land. It would have no relation whatever to his estate in any legal sense, but would be a mere personal covenant which he would be at liberty, at any time, to break and pay the consequent damages. These principles seem to me to be absolutely conclusive of the unsoundness of this theory of estoppel or personal covenant, whichever it may be. Its character is not very clearly defined in the opinion.

To show that the position above taken and the principles enunciated, concerning the nature and effect of a license or mere personal covenant, are correct, the following is quoted from Wood on Nuisances, a work by a celebrated and able author, whose analysis of the cases cited by him is no doubt perfectly accurate. I do this for want of time to set out and analyze all of them in my own language.

Section 360. "When assent has been given to one by another to do an act, the natural and probable consequences of which are to produce a certain result, and the person to whom the assent is given goes on and expends money on the strength of the assent and makes erections of a permanent character, while the consent does not give any interest in the land, and at law is revocable at any time, even though given for a consideration, yet a court of equity will enforce it as an agreement, to give the right, in a case of fraud or great hardship, or will generally enjoin a party from revoking it. But it must be made to appear in such a case, to entitle a party to such relief, that the license has not been exceeded, and that its exercise produces no more injury to the party than might have been reasonably foreseen or apprehended.

In *Veghte et al.* v. *The Raritan Water Power Co.*, (19 N. J. Eq. 142,) this question was discussed by the court upon an application for an injunction to restrain the defendants from raising and tightening their dam on the Raritan river, by which it was claimed that a larger portion of the water of

the river would be diverted than formerly. The defendants set up a consent from the plaintiffs, or a part of them, to the diversion of the water, in writing, and the erection of works and the diversion of water under it. The chancellor says: 'The consent in such case is only a license, at law or in equity. In general, a license at law will create no estate in the hands of the licenser, but will justify or excuse any acts done under it. It is revocable, even when given for a consideration. But in such cases, where the revocation would be a fraud, courts of equity give a remedy, either by restraining the revocation or by construing the license as an agreement to give the right, and compelling specific performance.'

Section 361. "As to the effect to be given to a license from one to do an act upon his land, at law, the court of New Jersey, in the case of *Hetfield* v. *The Central R. R. Co.*, (29 N. J. Law, 571) is in point. In that case the charter of the defendants authorized them to enter upon and take the lands required for their road, but directed that they should not enter without the consent of the owner. The defendant entered upon the plaintiff's lands by his consent, but did not take any conveyance from him in the manner required by law, in order to give them right or title. The court held that this consent did not dispense with the necessity of a deed or conveyance of the land or right in the form required by law. That it was not a consent that was intended to confer a title and was revocable."

"In *Wood* v. *Ledbitter*, (13 M. & W. 838,) the question as to the effect of a license arose in an action of assault and battery. The evidence disclosed that the plaintiff purchased a ticket for the sum of one guinea, which entitled him to admission to the grand stand. That the Earl of Ellington was one of the stewards of the races, and that the tickets were issued by the stewards, but were not signed by Lord Ellington. That under this ticket the plaintiff entered the ground on one of the race days, when the defendant, who was a policeman, under the directions of Lord Ellington, who first ordered him to leave, upon his refusing to do so committed the assault complained of, using no more force than was necessary for that purpose. Upon the trial the judge directed the jury that, assuming the ticket to have been sold to the plaintiff under the sanction of Lord Ellington, it still was

lawful for Lord Ellington, without returning the guinea, to order the plaintiff to quit the inclosure, and that after a reasonable time had elapsed, if he failed to leave, then the plaintiff was not on the ground by the leave and license of Lord Ellington, and the defendant would be justified in removing him under his orders, and this ruling was sustained in Exchequer."

"In *Miller* v. *The Auburn & Syracuse R. R. Co.*, (6 Hill (N. Y.) 61), which was a case somewhat similar to that of *Hetfield* v. *The Central R. R. Co.*, before referred to, the defendants erected their railroad with an embankment upon Garden street in Auburn, interrupting the plaintiff's access to his premises, in 1839, and maintained it until 1842, when this suit was brought. The defendants offered to prove that the embankment was raised under a parol license from the plaintiff, but the proof was excluded by the court and the case was heard in the Supreme Court upon the question of the admissibility of that evidence. Cowen, J., among other things, said: 'If what the defendants in this case proposed to show was true, viz., that the plaintiff verbally authorized the making of the railway, while the authority remained, their acts were not wrongful. License is defined to be a power or authority. So long as the license was not countermanded, the defendants were acting in the plaintiff's own right.'

"In this case the court uphold a license as a defense until it is revoked, and hold that it must be revoked before an action can be brought; but in *Veghte* v. *The Raritan Power Co.*, *ante*, the court held that the bringing of the action is a revocation of itself, and all that is necessary. But the former would seem to be the better rule, and the one generally adopted. The following authorities will be found applicable upon the question of the effect of a license."

Section 362. "The case of *Roberts* v. *Rose*, (L. R., 1 Exch. 82,) is a leading case both upon the effect of a license, the right to revoke it, and the rights to abate nuisances affecting their individual rights."

"In that case it appeared that the plaintiffs were the lessees of a colliery called the Bank colliery, and that in 1861 they obtained from the owner of the fee of the adjoining lands written permission to make a water course from their colliery to an old pit in what was called the Broadwater colliery. A

part of the surface of the Broadwater colliery was at that time in possession of a tenant, and the plaintiffs also procured a license from him to build and maintain the water course in question, and the tenant also used the water course for the prosecution of the business of brickmaking. Shortly after the watercourse was built, the plaintiffs were required by the owners of the fee to extend the watercourse over the spoil banks of the old pit, so as to join another water course that had formerly been built to carry away the waters from the Broadwater colliery, and which was discharged into a neighboring canal."

"The premises over which the water course extended were subject to mortgage, and early in 1861, but after the water course was built, the defendants leased the Broadwater colliery of the mortgagors. The lease was of the coal in or under the land, and leave was given to the defendant to occupy such parts of the lands as might be necessary for the due carrying on of the coal mines, and also to make use of the water courses over the land. The lessors reserved the right to make water courses for certain mines on the land, proper compensation being made to the lessees therefor."

"The defendant, on entering into possession, assented to the continuance of the plaintiff's water course, and certain changes were made therein at the defendant's request, and the extension thereof was also made as required by the owner of the fee."

"In 1863 the defendant applied to the plaintiffs for a money payment in consideration of their use of the water course, but the plaintiffs refused to comply with their demand, insisting that, under their license from the owner of the fee, they were entitled to continue their water course as it was."

"The defendants thereupon gave them notice that the water course must be discontinued, and the plaintiffs not having discontinued it, the defendant stopped up the water course on the lands of the tenant, from whom the plaintiffs had license, near the boundary of the premises occupied by the plaintiffs. The result of this obstruction was to pen back and throw the water pumped from the plaintiff's mines back upon the plaintiff's premises, and by its accumulation there it percolated through the soil into their mines."

"The court held that the license to the plaintiffs was revo-

cable, and, having been revoked, deprived them of the right to maintain the water course, but that the defendant was bound to adopt a reasonable mode of abating the nuisance, and so as to do no unnecessary or unreasonable damage, and if the mode adopted by him was unreasonable and unnecessary he would be liable. A verdict was found for the plaintiff, upon the ground that the obstruction of the water was unreasonable and unnecessary at the point where it was made, and upon hearing on exceptions in exchequer, the verdict was sustained."

The cases put by way of illustrating the application of this new doctrine are not apt. They are not parallel. They totally ignore the difference in subject matter of the contract. Nobody ever sells all the materials in one story of his house except in view of the wrecking of that house and its conversion into personal property. Coal, in place, is sold all over the world without any view of disturbance to the surface. Nobody ever sold a chair on which he was sitting with a right to remove it from under him before he got up. No particular chair, nor any particular position, is necessary to the personal support of an individual in his natural state. If he stands, lies down, or sits down, he is natural. The chair has no connection with his person. Besides, it would be an impossibility by any covenant or contract for one person to confer upon another any estate, right or title in his person. Of course, if one person allow another to tear down his house and move it away, he has no right to sue him. But by that act such other person acquires no interest in the estate. If he sell him the houses or any part of them, and authorize removal of them, he thereby severs them from the estate and converts them into personal property. If, when the purchaser comes to take them off, he refuse to allow him to do it, the only remedy would probably be an action for damages. But if he pass title to a part of the land, or give him an easement upon the land to be attached to his adjoining land, then he acquires a part of the estate. It is not a mere personal covenant. But the terms of the deed must be broad enough to take hold of part of the estate, take it out of the covenantor, and vest it in the covenantee. If this deed is to be operative, it must carve out of the surface owned by the plaintiff a part of it, a right in it, and attach it to the coal for the

benefit of the owner thereof, and make it a servitude or burden on the superincumbent land. Such sales as are supposed in the illustrations shown in the majority opinions are not sales of property in place. A sale of coal by deed, passing title, is a sale in place. It confers title to real estate, immovable property, not mere personal property. The rules of law, governing the rights in and to the two classes of property are wholly different. Nor are illustrations of agreements allowing a man to do something on his own real property of any force here. Such agreements pass no title. They merely bar the remedy for doing a thing which the actor had no right to do. This right of support is real estate, confessedly and indisputably. Title to it must pass by deed, not by mere estoppel, and a deed does not pass it unless the terms thereof extend to it with the same degree of certainty that is required in other cases.

A comparison of these results of the law of estoppel or mere license with the principles declared, and conclusions expressed, in the later English decisions shows conclusively that those decisions do not rest at all upon that law. *Bell* v. *Lore*, decided in 1883, after the true nature of the right of support had been ascertained, says the right to disturb or destroy it "must be clearly defined by some grant or equivalent assurance." In *Dixon* v. *White*, decided in 1883, Lord Blackburn said: "It is established that the titles may shew that the surface is held on the terms that the owner of the minerals is at liberty to remove the whole of them without leaving any support to the surface," thereby distinctly asserting that it is a question of title. In the same case, Lord FitzGerald said that if the mine owner claims the right "to get and remove the whole, though in doing so he may destroy the surface by removing its necessary support, *then he must shew by his title that he had such right.*" It is likewise so declared in the syllabus of that case in these terms: "If the owner of a piece of land sells the surface and reserves the minerals below it, with power to get them, he must, if he intends to have the power of destroying or letting down the surface by subsidence in getting them, frame his power in such language that the Court may be able to say from the titles that such was clearly the intention of the parties." In *Bell* v. *Earl of Dudley*, L. R. 1 Ch. D. 182, decided in 1894, Chitty, J., said:

"This inference (of retention of right of support) is strong; in order to rebut it the burden lies on the owner of the minerals to shew affirmatively and by clear words that he has the right of letting down the surface;" and this language is incorporated in the head notes of the case. If *Harris* v. *Ryding* and *Humphries* v. *Brogden* may be regarded as having been trenched upon by *Taylor* v. *Shafto*, *Shafto* v. *Johnson* and *Eadon* v. *Jeffcock* or by any of these, the later decisions, as just shown, must be taken and treated as having fully restored, to their pristine vigor and force, all the principles of construction of those first two cases, applicable upon the inquiry for the intent as to whether the right of support has been parted with. The altered view as to the nature of that right does not, in any degree, affect this question. As to this, the early English decisions are not, in my opinion, at all discredited, either at home or elsewhere.

Since, to my mind, the certain import of the decisions everywhere is to the effect that the right to destroy the support rests upon a grant, by the owner of the surface to the owner of the coal, of an easement or right in the surface as an appurtenance of the coal and a consequent burden or servitude upon the surface, it becomes necessary, I think, to keep in view the requisites of a deed sufficient to pass such an interest, and to test this deed by the rules governing the subject.

These principles are important, in view of the fact that the clause in this deed, relied upon as connecting or attaching to the coal a servitude upon the surface, contains not a word relating to, or touching, the surface. It adds nothing to the coal. The owner of the coal has a right to remove it, that right is an incident of his estate in it. We must look at this deed and construe it as the conditions were at the time of its execution. Nobody knew exactly what the geological formations were under that land. Nobody knew how the coal laid, its quantity or the nature of the overlying strata. Nobody knew how much coal it would take to support the surface. We may say that it was probable that it would take some, as it does almost everywhere in this State. But for aught that anybody knew to the contrary, the conditions existing in that tract of land might have been such as to enable the owner of the coal to remove every particle of it without letting down the surface. Not a word in the clause purports to grant any

right to injure or use the surface for any purpose other than those specified. None of these extend to the letting down of the surface. As to the removal of the coal, that was a power to do something not to the surface, but to the coal—not to the plaintiff's property, but to the defendant's property. And the thing authorized was what he had the right and power to do, by reason of his ownership of that property. It is not pretended by anybody that the grant of this power is in and of itself an express grant of any right in the surface. Thus far, the contention for the defendant rests not upon any grant, either express or implied, but upon the principle of estoppel which, in my judgment, absolutely fails to reach the question of title, and is, therefore, inapplicable to this case.

The alleged intent here to grant an easement out of the surface to be used and enjoyed in connection with the coal, disclosed by the clause granting the right to mine, excavate and remove all the coal, is a mere conjecture. As it does not stand upon any language which, in any way, includes or touches any part of the surface, its foundation is a mere presumption. No matter what intention the grantor had, if he did not express it in the deed, it is not effective. A deed never carries any interest or estate in land except by words of express grant or words which amount, in legal effect, to a grant. That a deed, in order to carry an estate or interest, must contain operative words of grant, is a rule from which the courts can never depart. Even when aided by a statute, requiring deeds to be liberally construed, this essential element must still appear.

"Section 313. The courts will construe the words used by the parties so as to give effect to the deed, if possible. 'The judges have been *astuti* to carry the intent of the parties into execution, and to give the most liberal and benign construction to deeds, *ut res magis valeat.*' Upon this principle a feoffment, or a bargain and sale from a parent to a child, to take effect after the death of the parent, may be held to be a covenant to stand seised to the use of the parent for life, because a deed of bargain and sale would be void.

A release to one not in possession, if made for a valuable consideration, will be construed to be a bargain and sale, or a covenant to stand seised, by which the estate might pass. And so a deed of lease and release has been held to be a cove-

nant to stand seised to uses where the consideration was a good one. A deed which cannot take effect as a bargain and sale, for want of a pecuniary consideration, may be given effect as a covenant to stand seised if there is a consideration of blood. In Massachusetts, where a valuable consideration is sufficient to support a covenant to stand seised, a deed of bargain and sale may operate as a covenant to stand seised when it is necessary that it should have that effect in order to carry out the manifest intention of the parties.

"Section 314. A deed without words of conveyance passes no title. In some states it is provided by statute that any instrument in writing signed by the grantor is effectual to transfer the legal title, if such was the intention of the grantor, to be collected from the entire instrument. But, even under such statutes, some words of conveyance are necessary. The statute does not wholly dispense with the use of words operative to convey, but simply imposes upon the courts the duty of construing liberally the words employed as words of transfer. An assignment of a deed, indorsed thereon, does not convey any interest in the lands therein described. In equity it might entitle the assignee to a decree for a specific performance, but it cannot operate as a transfer of the legal title.

"Section 315. If an instrument has no words of conveyance, the courts have no right to put them in by interpretation. 'Courts cannot make contracts for parties. It is not their province to write in an instrument words which will make it operative as a deed, where none of that character have been written by the parties themselves. The rule that courts will so construe an instrument as to make it effective does not mean that courts shall inject into it new and distinct provisions.'

"Section 316. A deed does not bind a person signing it unless it contains words expressive of an intention to convey some estate, title or interest. 'It has been said that the signing of a deed manifests the intention of the signer to be bound by it, and that the courts should construe every instrument so as to give effect to the intention of the parties to it. But the intention of the parties to a written contract must be derived from the language of the contract itself; and, where there is nothing in the deed to show an undertaking on the

part of one of the signers to convey, we do not see very clearly that his signature manifests a purpose to make a conveyance. Where the title is in one person, and the consent of another is essential, under the law, to convey such title, and such other signs the deed, his name not appearing thereon as a grantor, the signature, it would seem, would merely manifest his consent to the conveyance.' Merely signing, sealing, and acknowledging an instrument in which another person is grantor is not sufficient.

"Section 317. If from the whole deed the grantor appears to be named as such, and his intention to convey is manifest, the deed is not void, though his name does not appear in its proper place in the granting clause. Thus, where a conveyance is in the form of an indenture between the person who signs it as grantor, of one part, and a person named as grantee, of the other part the omission of the grantor's name in the granting clause, when it appears in the covenant of warranty as well as in the *in testimonium* clause, is not a fatal defect. The receipt of the consideration by a person who signed a deed but did not join in it as a grantor does not operate to give effect to the deed as his conveyance.

"Section 318. A deed by a husband in his own name only, conveying his wife's land in fee, in which she does not join, though she affixes her signature and seal, is not a conveyance of her estate in fee. Her signature, 'in token of her relinquishment of all her right in the bargained premises,' or 'in token of her release of dower,' does not convey her title in fee, nor bar her from asserting her title. That it was her intention to convey her estate in fee is not sufficient unless this intention is expressed in the deed. Such intention will not enable a court of chancery to correct the mistake and decree the execution of a perfect deed. The signing of the deed by the wife at most merely signifies her consent to the conveyance; it does not convey any interest or estate she has in the granted land. Under statutes which provide that a conveyance by a married woman may be made with the written consent of her husband, it is held that this consent is sufficiently manifested by his signing a deed by which his wife conveys her separate property, though he is not named as a party to the deed. The husband has nothing to convey, and his assent to the conveyance by his wife is all that is requir-

ed. The case is very different when the legal interest or estate is in the wife, and she does not join in the deed, or use any words manifesting an intention to convey such interest or estate, but merely signs a deed which purports to be a conveyance by the husband alone.

"Section 319. A wife cannot bar her right of dower by signing and sealing her husband's deed without any words of conveyance or of release by her of dower. By usage, however, in New Hampshire a wife may bar her dower by signing her husband's deed without any words of conveyance or release. The words, 'in token of her free consent,' used at the conclusion of a deed, do not sufficiently express her intention to bar her right of dower, nor do the words, 'I agree in the above conveyance.' If a wife having an estate in fee executes a deed of it with her husband, both joining in the granting part of the deed, the fact that the wife also releases dower and homestead in the granted premises does not restrict her conveyance to these interests, but the deed passes the title of the wife in fee." Jones' Law of Real Prop. in Convey., sections 313–319.

A deed can never convey a thing to which it makes no reference and does not purport by any language to pass. This deed does not grant a right to let down the surface either in express terms or any other language, touching or relating to the surface. The right of support belongs to the surface, no matter how, whether by reservation or *ex jure naturae*. It cannot be parted with except by cutting it out of the surface. A deed which makes no reference to the surface cannot, by any possibility, take anything out of it. In the clause relied upon here, there is no word which either expressly or impliedly touches the surface. No matter what intention Griffin had with reference to this right of support, if he did not use language which touches it, relates to it, carries it away, the defendant did not obtain it. "Nothing passes by a deed except what is described in it, whatever the intention of the parties may have been. Though parol evidence is often admissible to ascertain what lands are embraced in the description, such evidence cannot make the deed operate upon land not embraced in the descriptive words. A deed described the land conveyed as beginning at a certain rock, and running thence one mile east, one mile north, one mile west, and one

mile south, to the place of beginning, and also stated that it was the land set off to a certain Indian under a treaty with the government. The Indian had previously selected his land as 'a tract one mile square, the exact boundaries of which may be defined when the surveys are made.' After the deed was given, the Indian's land was located and patented so as to include a section not in the form of a square, no part of which lay within the boundaries named in said deed. It was held that deed, being for a specific tract of land, could not be construed to convey the grantor's interest in the land actually patented to the Indian. That one parcel or some portion of the lands is not described with sufficient certainty does not invalidate the deed as to other parcels that are sufficiently described." Jones Law of Real Prop. Convey., section 325.

Not only must a deed by some language used in it include the thing, title to which is set up under it; but the language must be certain. It is not enough that a man has a piece of land or other property and makes a deed conveying land to another man. Because it appears that he intended to convey something, the courts cannot permit a resort to parol evidence to show what he intended to grant. What he intended to grant must be shown by the language of the instrument, and parol evidence can only be used for the purpose of identifying that which is described in the deed,—applying the description to its subject-matter. Jones' Law of Real. Prop. Convey., section 323; *Mathews* v. *Jarrett*, 20 W. Va. 415; *Westfall* v. *Cottrell*, 24 W. Va. 763; *Dickens* v. *Burns*, 79 N. C. 490; *Brown* v. *Coble*, 76 N. C. 39.

The suggestion that a deed, even where there are terms touching property or property rights, claimed under it, will pass title thereto by anything but a necessary implication, where there are no words of express grant, is inconsistent with a rule of law applicable to the construction of all muniments of title. The phrases, "plain implication," and "necessary implication," have exactly the same meaning when used in reference to the construction of such instruments. By these is not meant a physical necessity, but a logical necessity. Where a clause is enlarged in its effect beyond the import of the words used, on the theory of an intent established by implication, it must be necessary to so enlarge it in order to give effect to the plain and express

provisions of other clauses, or the probability of intent must be so strong that the contrary thereof cannot be supposed. In *Wilkinson* v. *Adam*, 1 Ves. & B. 422, 466, Lord Eldon said: "With regard to that expression 'necessary implication,' I will repeat what I have before stated from a Note of Lord Hardwicke's judgment in *Cariton* v. *Hellier;* that in construing a Will Conjecture must not be taken for Implication; but necessary Implication means, not natural Necessity, but so strong a probability of Intention that an Intention contrary to that, which is imputed to the Testator, cannot be supposed." An intent by implication cannot be engrafted upon the whole instrument because it is barely probable that the grantor intended the words to have such broader meaning and effect. It is well settled that a more liberal rule obtains in the construction of wills than in the construction of deeds. There is never any presumption that a man granted a thing by deed. The presumption is that he did not, unless the language of the deed includes it. Nothing will ever be added to a deed upon the mere presumption that the testator intended to dispose of property; but in the law of wills, there is a presumption that a man who has made a will intended to dispose of his whole estate and not die intestate as to any of it. Another rule is that, when a will contains language relating to children, there is a presumption that the testator did not intend to give his property to strangers in preference to his children. But even in these cases, the lax rule contended for here does not apply. Though a will is aided by this presumption as to the intent of the testator, his whole estate does not pass, nor are his children preferred to strangers in the case of doubtful language, unless the intent to that effect appears by necessary implication. "There may be a legacy given by implication, but to raise such implication it must be necessary to do so in order to carry out a manifest and plain intent of the testator which would fail unless such implication be allowed." *Bartlett* v. *Patton*, 33 W. Va. 72. This rule was applied in the case just mentioned, in the very face of the presumption that the testator did not intend to die intestate as to any part of his property. "Since the courts endeavor to ascertain the intention of testator from his whole will, rather than disjointed parts thereof, and enforce this intention, if lawful,

when thus ascertained, it follows that it is possible for testator to dispose of property, not by any formal disposition in his will, but by necessary implication from his will taken as a whole. The presumption is very strong, however, against his having intended any devise or bequest which he has not set forth in his will. There must, as has been quoted in recent cases, be a probability arising from the whole will that testator intended to make the bequest or devise, which he has not set forth expressly, so strong, that it cannot be supposed that any other intention existed in the mind of testator." Page on Wills, section 468; *Michael* v. *Pye*, 75 Ga. 189; *Reinhardt's Estate*, 74 Cal. 365; *Eneberg* v. *Carter*, 98 Mo. 647; *Barnhard* v. *Barlow*, 50 N. J. Eq. 131; *De Silver's Estate*, 142 Pa. St. 74; *Sutherland* v. *Sydnor*, 84 Va. 880; *Bartlett* v. *Patton*, 33 W. Va. 71, 5 L.R.A.523; *Wilkinson* v. *Adam*, 1 Ves. & B. 445; *Boston Safe Deposit & Trust Co.* v. *Coffin*, 152 Mass. 95; 8 L. R. A. 740; *Masterson* v. *Townshend*, 123 N. Y. 458; 10 L. R. A. 816; *Goodright* v. *Hoskins*, 9 East. 306; *Jackson* v. *Billinger*, 18 Johns. 383; *In re Springfield* (1894), 3 Ch. 603; 64 L. J. Ch. (N. S.) 201; Smith's Trusts, L. R. 1 Eq, 79; Blake's Trusts, L. R. 3 Eq. 799.

Another proposition to be remembered is that even in the constructions of wills, liberal as are the rules, a court can never go outside of the language of the will and make it pass something or pass a thing to somebody, on the bare ground of a probability that the testator intended to do so. The intention must be gathered from the language of the will, and that language must either give the thing expressly or by necessary implication. By the use of the term, "expressly," it is not meant that it shall be given any particular formula of words; but only that the intent must be shown by express language, which language must reach to, and include, the object of the donation, the person to whom the thing is given, and must also take in by some form of description the thing to be given. Neither of these can be supplied except by necessary implication, and that implication must arise from some intent plainly expressed somewhere in the will, under the rule that in construing a will, all its parts must be considered. When, being so considered, something must be supplied which is not ex-

pressed in any form, in order to effectuate the general intent, it is necessarily implied. That is the only way a thing not expressed in a will can be added to it, and that addition must be founded upon an express intent in the deed as to other matters in some way connected with the particular matter. Nothing can be added upon any theory of intent not derived from the language of the will, no matter how clear it may appear from something outside of the will that it was intended. "In the interpretation of a will, the true enquiry is, not what the testator meant to express, but what do the words used express. When the language of the testator is plain and his meaning clear, the courts can do nothing but carry out the will of the testator, if it be not inconsistent with some rule of law." *Couch* v. *Eastham*, 29 W. Va. 784.

Such is the strictness of the rule in testamentary alienation by implication. It must be more strict in alienations by deed, because they are unaided by the presumptions as to intent as already stated. If any such rules are at all applicable to deeds, they must be of very limited application. No author, so far as I can see, mentions them among the rules given for the construction of deeds. Every deed, of course, carries with it everything naturally or artificially attached to the property conveyed. This does not stand upon any rule of conveyance by implication. It is an express conveyance, because the things that go with the land are parts of the land. I know of no instance in which a piece of property, not mentioned in the deed in some way, has ever been held to have passed by it, nor in which any person not made a grantee in a deed by some sort of expression, has ever been permitted to take property under it. As the liberal rules above mentioned, as being applicable to wills, do not apply to deeds, nothing can be held under a deed, unless it be conveyed by express words of grant or by some language or provision which is, in legal effect, the equivalent of a grant. Such other language or clause must be equivalent in the sense that it shows express intent, not mere possible or probable intent, to part with the thing claimed under it. It is not enough that it grants the right to do some other thing. It must show intent to part with the very thing claimed. The grant of a right to a man to

remove his own coal is very different from the grant to him of a right to let down the surface, belonging to another person, and it does not necessarily mean that the surface shall be let down or may be let down.

Such is the result of proper application of the rules of law, if the words of the clause, "together with the right to enter upon and under said land and to mine, excavate and remove all of said coal," be given their full force and effect according to their ordinary and plain meaning. If we say the grantor thereby authorized the removal of every pound of coal under the land, it is not enough to carry the right to let down the surface, for the language falls short of granting any right to let it down. But, be this as it may, the very latest English authorities say no mere grant of any powers to work the mines, however broad and ample they may be, will be accepted by the courts as showing intent to part with the right of support. The present state of the law is expressed by Lord Chancellor Halsbury, in *New Sharlstan &c. Co.* v. *Earl of Westmorland*, decided by the House of Lords in 1900, reported in L. R. 2 Chy. D. (1904) page 443, as a note to *Bishop Auckland &c. Society* v. *Butterknowle &c. Co.*, as follows: "My Lords, the state of the law is, now, by the decisions which have been referred to, perfectly clear. The mere fact of giving a right to sink pits and to work or get coal does not of itself establish a right to get rid of the common law right of the surface owner to have his surface undisturbed. That is a plain proposition of law, and when one approaches the question from that point of view it is manifest that in each of the cases that have been referred to the learned judges were talking of the particular instruments they had then to construe, and their problem was to find out whether by the express language of the grant, or by that right which might be construed to be the general effect and intent of the whole instrument, there was a power to interfere with that common law right. I do not think that those principles were so firmly established some ten or twenty years ago as they are now; but that is the proposition of law, and it must be applied to the particular instrument which the Court has to construe in each case. In this instrument, my Lords, I confess I am wholly unable to find any such permission to let down the

surface. One observation which lies very plainly before one is that there is no express permission to do it, and if the arrangement between the parties was that it was contemplated, it is not, as was pointed out, I think, in *Love* v. *Bell*, 9 App. Cas. 286, an immaterial circumstance that it is not mentioned when they are dealing with such a subject, and dealing with it in such a way, as would naturally suggest the question whether that is to be the state of relations between the parties—the lessor and lessee, or the vendor and vendee, as the case may be. The absence of such an express permission is not without its significance. Then we have to deal with the question whether upon the whole instrument we can discover from its language that the parties did contemplate giving the right to let down the surface. My Lords, I can find no such right here; and it appears to me that, applying the principle of *Davis* v. *Treharne*, 6 App. Cas. 460, and the long line of cases which may have now settled the law, it would be reversal of what has been so settled if your lordships were to assume, or from anything that you can find in this deed to imply a right to let down the surface. It appears to me that the law upon the question must now be regarded as settled, and, there being no express permission, the onus lies on the person who says he has a right to do so, to show something in the instrument which gives him that right." In *Bishop Auckland &c Society* v. *Butterknowle &c. Co.*, L. R. Ch. D. (1904) p. 419, 424, Farwell J., said: "Words, *however large*, applicable to the right of working and privileges connected with it and compensation for the exercise of such right and privileges are not enough, at any rate, if the words used are fairly applicable to the ordinary course of working and nothing more." In the same case, pp. 435, 436 and 440, Vaughan Williams, L. J., said: "The keynote of the law which controls the relations of surface owners and mineral owners is as stated by Lord Halsbury in *New Sharlston Collieries Co.* v. *Earl of Westmorland*—namely, that 'the mere fact of giving a right to sink pits and to work or get coal does not of itself establish a right to get rid of the common law right of the surface owner to have his surface undisturbed.' This law does not exclude the obligation of the Court to ascertain the meaning of the par-

ties to a contract, whether such contract is embodied in an Act of Parliament or not, but the 'letting down' of the surface by underground workings is so injurious to the user of the surface by the surface owner, that it is not reasonable to construe a contract as giving the mineral owner this right unless the words of the contract make this plain, either by express words or by implication. The surface owner has by common law a right to have the surface supported by the subjacent lands. It is not reasonable to suppose that the surface owner intends to give up a right so important for the 'user' of the surface without adequate consideration, and the Courts do not easily come to the conclusion that it is the intention of a contract to give up this right to support, and therefore, in construing a contract intended to determine the relative rights of the surface owner and the owner of the subjacent land, it is fitting to take into consideration, not only the words of the contract, but the nature of the right which it is sought to say the contract intends that the surface owner shall surrender. In this case there are no express words giving a right to the mineral owner to let down the surface, so it becomes necessary to see if the words of the contract embodied in the Act of Parliament are such as to make it plain that it was the intention of the parties thereto that the surface owner should surrender the right of support. * * * * * The case is near the borderline; but I am not prepared to hold that the terms of the compensation clause are sufficiently plain and unequivocal to make it right that we should hold that there is by necessary implication power given to the mineral owner to let down the surface in a case in which there is no express power, and the general powers construed by themselves would not include such a power. I think the decision of Farwell J. ought to be affirmed." In the same case, Romer, L. J., said: "General powers of working conferred by the act of the mine owner, however large, will not be held to take away the right of support if the general powers are not inconsistent with the right. * * * * * And all I need say is, after a careful consideration of the compensation clause in the present case, that the Legislature has not made it clear that it was contemplating compensation for damage arising from letting down the surface. The words: 'search-

ing for, winning and working the mines and quarries within and under their respective allotments' are quite general, and I cannot gather from the use of the word 'working' (a very general word and of large import), even coupling it expressly with the word 'under' the allotments, that the Legislature must have contemplated damage arising from letting down the surface." It is to be observed that the case just quoted from follows *Bishop Auckland &c. Society* v. *Butterknowle &c. Co.*. decided in 1900, which took for its key-note *Bell* v. *Love*, 9 App. Case. 286, decided by the House of Lords, in 1884. Lord Chancellor Selborne based his opinion in that case upon *Harris* v. *Ryding*, *Dugdale* v. *Robertson*, *Davis* v. *Treharne*, and *Duke of Buccleugh* v: *Wakefield*, passing over, in silence, *Eadon* v. *Jeffcock*, *Taylor* v. *Shafto* and *Shafto* v. *Johnson*, as did also Lords Watson and Bramwell. His interpretation of *Davis* v. *Treharne* was as follows: "In the same case, *Davis* v. *Treharne*, two pages later, Lord Blackburn deals with the question which there arose, and on this principle: that when the person on whom the burden of proof lies has to satisfy it, he will not be able to do so merely by showing that there are words, however large, applicable to the right of working, and privileges connected with it, and compensation to be paid for working and for the use of those privileges, which may receive full effect consistently with the right of support. I will not refer in detail to that passage: it is in accordance with what is to be found in other authorities." Lord Bramwell said: "If there had been nothing more in the Act, the Dean and Chapter would have had no right to touch the surface to get the minerals. And if all the right the Act gave them was to use such part of the surface as was necessary to get the minerals they would have no right in getting them to let down the surface. In other words, when the ownership of the soil generally and of the minerals is severed, the mineral owner has no rights as against the surface in getting the minerals except what the instrument of severance gives him, and if it gives the right to get the minerals without more, there is no right to let down the surface." All these late decisions emphasize the proposition that the intent to be ascertained is that the surface may be let down—not that the coal may be removed or that large powers may be exercised

under ground—and occasionally there is an intimation to the effect that even such intent is not enough, and that ample compensation for that, aside from the consideration recited in the deed, must appear to have been specially provided for. Thus, in *Bell* v. *Love*, 9 App. Cas., Lord Watson said: "The terms of the reservation to the Dean and Chapter of Durham present a marked contrast to the broad and comprehensive terms of the clause with which the House had to deal in *Duke of Buccleugh* v. *Wakefield*, a clause which, to use the words of Lord Hatherly conferred the 'largest imaginable power' upon the owner of the mines; yet in that case the decision of the House was given in his favor, not because the clause *per se* enabled him so to work so as to cause subsidence, but in respect that its powers were made subject to the condition that those who worked the mines, should make full compensation for all injury thereby occasioned to the owners of the surface. I concur in the opinion expressed by Mellish L. J. in *Hext* v. *Gill*, that 'no one can read the judgment without coming to the conclusion that, if the provision as to compensation had not been there, the House of Lords, notwithstanding the strength of the other words, would in all probability have come to another conclusion.'"

That the grant of a right *to remove all the coal* under the land does not authorize letting down the surface was expressly and unequivocally decided and held in *Aspden* v. *Seddon*, 10 Chy. App. 397, a case cited in the opinion of the majority of this Court. To show this no more is necessary than a quotation from that part of the opinion of Mellish, L. J. which decides the case, emphasizing the language that states this conclusion. It reads as follows: "Now, by the deed, all mines and seams of coal, ironstone, and other minerals are reserved to *Stott*, with full liberty, power, and authority for *Stott* and his lessees 'to search for, get, win, take, cart and carry away the same, and sell or convert to his or their own use the said excepted mines, veins and seams of coal, cannel and ironstone and other mines and minerals, or any of them, or any part or parts thereof, at pleasure, and to do all things necessary for effectuating all or any of the aforesaid purposes.' These words do certainly appear in *very plain terms to give power to the mineral owner to remove any part of the minerals at*

his pleasure; but, nevertheless, we think that we are bound by the authorities to hold that these words are not by themselves sufficient to take away the surface-owner's right to support. *If the sentence had stopped there, these words would be consistent with the construction that the mineral owner may take away every part of the minerals, provided he can do so without violating the surface-owner's right to support, but not otherwise, and some further words would be necessary to prove that the intention of the parties was that the mineral owner should be at liberty to take away the whole or any part of the minerals, notwithstanding he might thereby let down the surface or any buildings thereon.* Accordingly the respondents rely on the words which immediately follow in the deed as sufficient for this purpose. Those words are, 'but without entering upon the surface of the said premises, or any part thereof, so that compensation in money be made by him or them for all damage that shall be done to the erections on the said plot by the exercise of any of the said excepted liberties or in consequence thereof.' As by the express words of the reservation the mine-owner in working the mines *is not to enter upon the plot of land conveyed by the deed, the damage to the buildings for which compensation is to be given must be damage to the buildings caused by the removal of the minerals reserved, and therefore it follows that a right to remove all the minerals, notwithstanding the buildings above might be thereby damaged,* was one of the liberties reserved by the deed. In substance, the plain meaning of the whole reservation seems to us to be that the mine-owner is to be at liberty to remove the whole or any part of the minerals at his pleasure, paying compensation to the surface-owner for any damage which may be thereby occasioned to the buildings of the surface-owner, which is equivalent to saying that he may remove the whole of the minerals, notwithstanding the buildings may be thereby damaged, subject to a liability to pay compensation. We do not think there is any other clause in the deed which really affects the question." Test the language of the deed in this case by the opinion in *Aspden* v. *Seddon* and reach the conclusion declared by the decision of this Court in this case! It is an utter impossibility. *Aspden* v. *Seddon* reiterates in plain terms, the following declaration of Baron Park in *Harris* v.

Ryding, the first reported case: "I do not mean to say that all the coal does not belong to the defendants, but that they cannot get it without leaving sufficient support."

Strange as it may seem, *Aspden* v. *Seddon* is cited by Mr. MacSwinney, 339, for the proposition, quoted in the majority opinion, to the effect that the later English cases construe mining deeds and leases in a manner different from the "curious mode" adopted in the earlier ones. The decision was an absolute necessity arising from the terms of the deed. In no other possible way could they be made effective. The compensation clause could not be referred to surface workings, for none were authorized. Hence, damage to the surface from workings underneath was the only damage that could result, or be compensated. The rule of presumption against an intention to part with the right of support, asserted in the early cases, was allowed to stand in that case until overcome by the absolute necessity of making it yield in order to give effect to plain terms used in the deed, utterly irreconcilable with any other construction, so far as the court could then see. And, moreover, whether *Aspden* v. *Seddon* is good law in England today may well be doubted, in view of the opinion of Lord Davey in *New Sharlston &c. Co.* v. *Earl of Westmorland*, decided in 1900, concurred in by Lords Brampton and Robertson, which, in part, reads as follows: "Speaking for myself, I cannot see why a covenant providing a particular measure or mode of obtaining compensation is in any way inconsistent with the existence of an obligation not to let down the surface, even though that covenant extends beyond the surface and is applicable also, or even exclusively, to underground operations. The use of the words 'by reason of the exercise of the powers' does not seem to me to carry it any further, because it may apply to any incidental injury done—whether accidentally or wilfully makes no difference—whilst exercising the powers. It does not seem to me to give a license to do the injury, if you say that a person shall pay compensation if he does it. A covenant to pay compensation for doing a thing which you are prohibited from doing is in no way contrary to or inconsistent with the continuance of the obligation not to do it. Indeed, one may go further and say that, if the thing nothwithstanding the prohibition is done, there is no other means by which you

can obtain a remedy for what is past (an injunction, of course, will not extend to the past) except by provision for payment of compensation. Therefore, I do not accede to the argument that the existence of a covenant for payment of compensation for letting down the surface is, whether it applies wholly or partially to underground operations or not, in any way inconsistent with the continuance of the common law obligation." Lord Davey's views were approved in *Bishop Auckland &c. Society* v. *Butterknowle &c. Co.*, decided in 1904, and elaborated upon by Vaughan Williams, L. J., as follows: "Be this how it may, it seems to me that the finding of Lord Esher that the only damage which could be done by the underground working would be by causing a subsidence of the surface does not bind us today, because it is a finding of fact in a particular case arrived at by consideration of the words of a particular instrument which had to be construed in that case, and is not a judgment laying down a canon of construction. I can conceive myself injuries which might be caused by underground working other than 'letting down the surface.' It seems to me that underground working might affect the springs and streams and wells on the surface, and I am not sure that underground working might not affect the surface or the buildings on the surface by vibration, without actually letting the surface down."

MacSwinney on Mines was published in 1884, since which time some very important cases have been decided, and the tendency has been strongly in the direction of the rigidity of the presumption in favor of the retention of support. MacSwinney's first and second rules, quoted by JUDGE COX, are mere general conclusions, for which no particular authority is cited by him. The third undertakes to set out specific rules, founded upon authority, saying: "Where the mine owner is relieved from liability for damage, the surface owner may often be presumed to have been compensated by anticipation." He deduced this rule from *Rowbotham* v. *Wilson*, cited, *Richards* v. *Harper*, L. R. 1 Exch. 199, *Williams* v. *Bagnall*, 15 W. R. 272, *Buchanan* v. *Andrew*, L. R. 2 Sc. & D. 286, and *Bensfield &c. Board* v. *Consett Co.*. In the first, the clause of release exonerated from liability "to any action or actions for damage on account of working and getting the said mines, for or by reason that the *surface of*

the lands aforesaid may be rendered uneven and less commodious to the occupiers thereof, by sinking in hollows or being otherwise defaced and injured where such mines shall be worked." Moreover, the award, under which the plaintiff took his title, contained the following recital: "The said several proprietors, parties to these presents and interested in the disposal of lands and mines under the circumstances aforesaid, having agreed with each other and being willing and desirous to accept their respective allotments in their several situations hereinbefore declared, subject nevertheless to any inconvenience or incumbrance which may arise from the cause aforesaid." Injury to the surface resulted necessarily from giving effect to these provisions. In no other way could they have had any effect, as the court then believed. There was nothing else to which they could refer, and they extended to, and expressly mentioned, the surface and injury thereto. Nothing was left to presumption. The second case went off on an entirely different point, the deed relied upon never having been recorded and the surface owner having neither actual nor constructive notice of the right claimed by the mine owner. *Williams* v. *Bagnall* was like *Aspden* v. *Seddon*, except in one particular. There was in it a clause releasing from liability instead of one providing for compensation. The deed allowed nothing to be done on the surface. Hence, the injury contemplated by the release was necessarily injury from underground working—subsidence. It was a case of necessary implication,—of letting down the surface or rejecting part of the deed,—because it could not mean anything else. The nature of *Buchanan* v. *Andrew* and the grounds of the decision are best stated in the following language of Lord Chancellor Hatherly, taken from his opinion, delivered in the House of Lords: "Your Lordships will see that this express agreement to exclude claims for damage is not confined to some particular description of damage, but it extends to any damage, the words being 'and shall not be liable for any damage.' Secondly, the feu contract particularly takes notice of the buildings, and of the liability of those buildings to damage through the workings; and it says that the Superior shall not be liable for any damage which may happen to any buildings then upon the property, or afterwards to be there. The importance of that reference to build-

ings will be seen presently, when we come to the latter part of the deed which relates to that particular subject. Thirdly, the feu contract takes notice of the modes of working by which such damage may happen, and puts foremost 'long wall workings,'—a remarkable thing; because that was not the mode of working actually in use, or which ever had been in use there; and it was a mode of working which would completely extract, if it were followed, the whole of the coal without leaving any support whatever, except such limited supports as might arise by rubbish left in the mine, and which, according to the evidence relating to this mine, would have been clearly insufficient to prevent damage by subsidence. I ought further to remark that the feu contract notices two kinds of damage: the one direct damage by the working of the seams remaining to be worked; and the other what I may describe as indirect damage by the subsiding of the wastes in the two seams already worked, in consequence of those excavations. The feu contract deals with the damage arising from the loss of lateral support occasioned by working in the neighborhood, as well as with the damage arising from the loss of support occasioned by workings immediately under the surface in question. Can anything possibly be more clear, than that the intention of the parties on both sides was that the Superior was to have the unrestrained right of taking out the whole and every part of the reserved minerals, the whole risk of any consequent damage being undertaken and to be sustained by the feuar?" The deed provided for "Long-wall" working. By that method, all pillars were withdrawn and the surface let down. It released the mine owner from all damage of every kind, occasioned by the workings. This is another clear case of absolute necessity resulting from express terms relating directly to the surface and injury thereto by subsidence. *Bensfield &c. Board* v. *Consett Co.* was a case of injury to a public highway, established pursuant to a local Inclosure Act, by which a commons was enclosed and partitioned, and the mine owner released from liability for damages to the surface. The court refused to apply to the public the rules governing the rights of individuals, saying it could not have been intended, that an Act, which appointed a public road, should,

at the same time, legalize a public nuisance by injuring the road. So the principle of that case has no application here.

It will be observed that MacSwinney does not say a release of liability will always, and of itself, sufficiently evidence intent to part with the right of support. He would not be justified, by the authorities he cites or any others, in intimating that it will ever do so. The cases just analyzed show that the liability for which the release is provided must affirmatively appear to be liability for damages resulting from letting down the surface. Not one of them stops short of the disclosure of such intent by express words or necessary implication. They are no authority for the proposition that a general release from liability for damages, and nothing more, will exonerate the mine owner from the consequence of subsidence, occasioned by him. Some later cases, illustrating the effect of such a clause, not only fail to carry it so far, but show that it stops short of that. In *Consett Waterworks Co.* v. *Ritson*, 22 Q. B. D. L. R. 31, decided in 1889, the Inclosure Act under which it arose provided that the lord of the manor should enjoy all mines and minerals as fully and freely as if the act had not passed, without paying damages or making satisfaction for so doing, &c.: and, further provided that the annual rental of 500 acres (out of about 20,000) should be set a part to provide for the compensation to which the allottees of the surface might thereafter be entitled, any deficiency to be made up by means of a rate levied upon the allottees. The Court of Queen's Bench held the lord answerable for letting down the surface, notwithstanding the provision for compensation; but the decision was reversed by the Court of Appeals. Commenting on the decision of the Court of Appeals in the *Consett Case*, Vaughan Williams, L. J. said, in 1904, in *Bishop Auckland &c. Society* v. *Butterknowle &c. Co.*: "It is argued that this Court is bound by reason of its own earlier decision, on the Consett Case to hold that the necessary effect of a compensation clause, coupled with the words 'without making or paying any satisfaction for so doing,' if it extends to working under the surface, is to give the mine owner a right to let down the surface. But it seems to me that all that the Court of Appeal were doing in the *Consett Case* was to construe those words in that case, and that we are not bound to put the same construction in this

case if we find matters in the present statutory contract which were not present in the *Consett Case* going to negative the intention to give the lord a right to let down the surface. Before calling attention to these differences, I would like to call attention to the fact that Lord Esher, at all events, gave his judgment upon the basis that the presence of a compensation clause takes away the fetter put upon the courts as to construing 'large words,' according to their ordinary effect. I do not think that this view is in accordance with the decisions in the House of Lords. It may be that the presence of a 'compensation clause,' especially where the compensation is to come from others than those who do the act for which compensation is to be made, is a matter to which considerable weight ought to be given on a question of construction, but I cannot think that there is no fetter on construction left. The presumption in favor of the common law right of support should still prevent the Court from construing 'large words' as freely as if no such presumption existed. Now the words of the compensation clause in the present Act are as follows: (His Lordship read the clause, and continued:—) It appears, therefore, that any person who suffers damage in his allotment by the 'searching for, winning, and working of the mines and quarries therein,' or by the laying or repairing of wagon-ways, and a number of other matters (the damages resulting from which last-mentioned causes would be obviously small), is to complain to one or more justices, who are to inquire into the compensation in a summary way and to finally settle and determine the damages sustained by such person, which damages are to be borne by the occupiers of the several allotments ratably in proportions to be fixed by the justices, with a liability to distress in default of payment. It will be observed that the damages from whatever cause are to be paid by the occupiers, not by the owners and proprietors of the allotments, who are mentioned a few lines later, and that the summary inquiry before the justices to finally settle the damages recoverable from the occupiers by distress seem very unsuitable to the fixing of large damages, but suitable rather to the recovery of small damages. Compare s. 48 of the Consett Act. It is true you find the same collocation of damages from various causes, but these damages are to be paid primarily, not by the occupants, but from a fund

resulting from the rents of lands allotted to justices as trustees for the very purpose of providing compensation to persons injured by the working of the mines. It is true that there is in s. 49 a provision that if the fund formed by the clear rents and profits is deficient, the deficiency may be recovered from the owners or occupiers of all the several allotments ratably in proportion to value, and may be recovered by distress, but it is provided 'that every occupier or tenant who shall have paid such damages as aforesaid shall and may deduct and retain out of his or her rent or rents so much money as he or she shall so pay.' I am not saying that mere inadequacy of the statutory compensation would justify a limitation of the 'large words' of definition of damages, but I think that the consideration of the class of persons on whom the liability to pay the compensation is thrown may make it right to put a narrow meaning on the words defining the damages for which compensation is to be given. With regard to the *Consett Case* itself, I am not sure that it is consistent with the observations of Lord Davey in *New Sharlston Collieries Co.* v. *Earl of Westmorland*, to which I have already called attention. It clearly would not be consistent with those observations but for the differences in the sources from which the compensation is to be paid. It may be, however, that Lord Davey's observations as to the payment of compensation, rather importing that the thing the doing of which is to be compensated for is wrong than that it is right, only apply where the compensation is paid by the person doing that act." In the same case, Romer, L. J. commented on the *Consett Case* as follows: "But then come the words: 'And that without making or paying any satisfaction for so doing.' And it is with reference to somewhat similar (though not identical) words in the Act considered in *Consett Waterworks Co.* v. *Ritson* that some of the passages in the judgments occur which have occasioned me difficulty in the present case. I am bound to say that I cannot fully follow or appreciate the force of some of the observations in the passages in question. I cannot myself see why the words in question are not quite consistent with the surface owners having the right of support. The expression without making or paying any satisfaction 'for so doing' means to my mind, after I find that 'so doing' means doing something not involving the right to

let down the surface, merely not making or paying any satisfaction for doing any of the acts authorized or enumerated, and is not dealing with or considering the act of letting down the surface. At any rate, that is the conclusion I come to in the present case, notwithstanding what was said in the *Consett Waterworks Co.* v. *Ritson*. That being so, all that remains for me to consider is the compensation clause. Again there are, I admit, some passages in the judgments in the *Consett Waterworks Co.* v. *Ritson* with reference to the compensation clause there considered which have caused me considerable difficulty, for those judgments are of the Court of Appeal, and would or might bind me if the compensation clause there had been identical with that in the present case. But the two clauses are not identical. I need not enumerate the differences. Some of them have been already referred to by the Lord Justice in his judgment just delivered. And all I need say is, after a careful consideration of the compensation clause in the present case, that the Legislature has not made it clear that it was contemplating compensation for damage arising from letting down the surface. The words: 'searching for, winning, and working the mines and quarries within and under their respective allotments' are quite general, and I cannot gather from the use of the word 'working' (a very general word and of large import), even coupling it expressly with the word 'under' the allotments, that the Legislature must have contemplated damage arising from letting down the surface. And this view is fortified by the provision that the persons who have to pay the compensation are only the 'occupiers' of the allotments, and moreover occupiers excluding the occupier of the allotment damaged." These two cases show conclusively that a mere general release is not enough to authorize the letting down of the surface, because it stops short of the expression of any intent to allow the surface to be affected in that way. Another case, illustrating and accentuating this view is *Belt* v. *Earl of Dudley*, L. R. 1 Chy. D. 1, decided in 1894. The Inclosure Act under which it arose released from liability and provided for compensation for "great damage" to which the lord of the manor was himself obliged to contribute.

I have quoted enough from the decisions to demonstrate that a compensation clause alone is not sufficient to show in-

tent to relinquish the support, *Davis* v. *Treharne*, even though it expressly relate to underground workings, *New Sharlston &c. Co.* v. *Butterknowle &c. Co.* Such a clause and a release from liability both failed in the *Bishop Auckland Case*.

From the foregoing review of the English decisions, the following conclusions are inevitable: First. Neither the principles of estoppel, nor those of mere license, govern in the construction of a lease, deed or statute to determine whether the right of subjacent support is thereby relinquished. A provision in an instrument, to have such effect, must be a grant of a right in the surface or an equivalent assurance. Second. Such provision must, in express terms, in some form, relate to, and permit injury of, the surface by subsidence, occasioned by underground workings. Third. The express grant of a right to remove all the coal, without an express release of liability for consequent damages, resulting from subsidence, or a provision for compensating for such damages, is not sufficient. *Aspden* v. *Seddon; Williams* v. *Bagnall; Davis* v. *Treharne; Harris* v. *Ryding*. Fourth. The consideration recited in a deed, conveying minerals, will never be presumed to include compensation for loss of the right of support, in the absence of an express release from liability for damages, resulting to the surface from subsidence, occasioned by the working of the mines. Fifth. The *right of support* passes, not by implication, but only by express grant or an equivalent assurance; but *intent to pass it* may be disclosed by necessary implication, arising from express language, relating to the surface or right of support. The clause in the deed under consideration here, relied upon as passing the right of support, wholly fails to comply with these conditions and requirements. I think I made it clear in my former opinion that that clause has another purpose and stated what its office is. No attempt to get rid of that exposition of its purpose has been made; and I, therefore, consider it unnecessary to say anything more on that branch of the subject, except that the cases herein reviewed overwhelmingly sustain the proposition that it must be subordinated to the general intent shown by the deed, whenever that can be done. I have plainly demonstrated how it can be done.

But it is said this doctrine leads to an absurdity, for condi-

tions may be such as to require the whole of the coal to be left for the support of the surface. In one or two cases I have examined, the court has ventured to say that, if the deed conferred no right to disturb the surface, and none of the coal could be taken out without letting down the surface, then it must all be left; but it is a mere dictum. The cases in which the statement has been made presented no such question for decision. This hypothesis puts an extreme case, such as is not likely ever to be found in this State, and occurs rarely, if ever, elsewhere. General rules and laws are neither founded upon, nor controlled by, such exceptional conditions. The law assumes that contracting parties will be governed by reason, common-sense and their knowledge of conditions. If the coal lies under a thin stratum of earth, such as must come down on removal of any of the coal, this condition is apparent, and it is not to be assumed that a man would do the idiotic act of buying the coal without taking, in his deed, an express grant of the right to let down the surface in taking it out. He is presumed to know the conditions, when apparent, as well as the law. He is bound to know both, and if he puts himself in a helpless condition by his own contract, with knowledge both of the facts and the law, it is beyond the power of any court to extricate him. Hence, the effort to break down the well established law, by the process *reductio ad absurdum*, runs counter to the law itself, and so fails. There is one case, however, which, as applied to china clay, expressly holds that the owner, not having the right to disturb the surface in obtaining the minerals, was bound to leave every bit of it, for the reason that none of it could be removed without tearing up, and disturbing, the surface. That case is *Hext* v. *Gill*, L. R. 7 Chy. App. 699. The Duke of Cornyall had granted the surface, reserving to himself "all mines and minerals within and under the premises with full and free liberty of ingress, egress and regress, to dig and search for, and take, use, and work said excepted mines and minerals." It was admitted in the case that china clay could not be gotten without totally destroying the surface. A bill, by the owner of the surface to restrain the owner of the minerals from taking china clay, having been dismissed by the Vice-Chancellor on the ground that the reservation included china clay with the power to get

it, the court of appeals held "that the china clay was included in the reservations, but that the surface-owner was entitled to an injunction to restrain the owner of the minerals from getting it in such a way as to destroy or seriously injure the surface." This prevented the mining of any china clay at all *Hext* v. *Gill* has been cited with approval as a leading case from the date of the decision, 1872, down to the present time. Moreover, it post dates the decision of *Rowbotham* v. *Wilson* in which the new view as to the nature of the right of support was settled. That case is cited in the opinion. Another case somewhat similar is *Bell* v. *Wilson*, L. R. 1 Chy. App. 303, in which it was held that a deed conveying all mines and minerals, but giving no right to let down or destroy the surface, included freestone, but did not authorize the working of an open quarry on the surface, and that whatever freestone should be taken must be obtained by means of underground quarries without disturbing the surface. Viewed in the light of the nature of their respective subjects-matter and the conditions and circumstances, these two decisions show that the application of this law, in its alleged absurd aspect, operated justly, according to each party what the deed, upon a fair and reasonable construction, gave him and nothing more. In either case, to have allowed the mine owner to do what he had undertaken, would have deprived the other party of practically everything that the deed purported to vest in him. It would have left him with the legal title to a worthless thing, a surface which could not be beneficially used, and that on a bald and obviously false presumption that he had been compensated for conveying away in substance, but not technically, what, by the tenor and effect of the deed, he appeared to hold. Such is the operation of the deed now under consideration under the construction which this Court gives it. Griffin is deprived of the surface as well as the coal, notwithstanding the fact that he took the strongest possible measure for retaining it, by not referring to it in his deed in any way, except by giving certain specific and clearly defined rights and privileges in and upon it. As owner of the whole tract, he undoubtedly had title to the surface. By not, in any way, granting the surface, he felt that he must have retained it. I think he did. This decision admits that he did, but it nevertheless destroys that surface in his hands

and entertains and enforces the intolerable presumption that he has been paid for allowing this to be done. Search will be made in vain for any other decision in which such a presumption was allowed, under a deed, lease or legislative act, (and as to all of them the same principles and rules of construction now apply, *Bishop Auckland &c. Society* v. *Butterknowle Co.* 1904), which did not contain an express release from liability for damages, and, moreover, for damages for letting down the surface. The Court had to be able to see plainly that the damages contemplated by the release were that kind of damages. Where the instrument did not contain such clause of release, a provision for compensation had to affirmatively appear in the deed. In cases involving leases, the royalties stipulated for were sometimes treated as such provisions.

The decision in this case says the deed grants the right to remove all the coal, and that this grant incidentally carries with it the right to do all things which may be incidental to the exercise of that power, and therefore includes a grant of a right in the surface. I think I have effectually shown that the law does not warrant any such construction. For this purpose, I have adverted to general legal principles. But, on this very point, I have a decision which distinctly and emphatically sustains my position, and decides that the title to land, or an easement in land, does not pass, as an incident to the grant of a right merely to do an act. An Act of George II authorized certain persons to convert an existing brook into a navigable stream, and to maintain such navigation and to make such new cuts and canals as might be required for the purpose, paying compensation by annual rent or a payment in gross to any land owner for user of or damage to his land in carrying on or maintaining the said navigation, and to charge tolls for the user by the public of the said brook, cuts and canals. There was no express power given to purchase lands, and there was no reference to mines or minerals, nor any express provision for their purchase. The brook was converted into a canal. Many years afterwards the owners of the coal under the canal worked so as to cause a subsidence, and the canal owners sought an injunction to prevent them from injuring or destroying the canal by mining the coal. The court held "that the Act of George II was to be

read *as equivalent to a grant by the owners of land* over which the canal passed of a mere right to make and maintain the canal as a waterway, *and not to a grant of the surface land; and that a grant of such a right did not carry with it, as a necessary incident, a right of support so as to prevent the landowners from working their adjacent mines.*" It was merely the grant of the use of a stream, a right to do certain acts, stopping short of the use of any express words, giving, or purporting to give, any interest in the land.

Having thus satisfied myself of the correctness of the position I have taken in this case, I wish slightly to qualify one proposition asserted in my former opinion. It is there said or intimated that a covenant not to sue, running with the land, might be the equivalent of a grant of a right to disturb the surface. That depends upon its terms. A covenant not to sue for removing the coal or all the coal would not run with the land. A covenant not to sue for damages to the surface by subsidence, resulting from removing coal or working the mine, might be sufficient. Whatever the form, there must be express words in the instrument from which the intent to allow the surface to be let down can be ascertained. It cannot be put in as a mere presumption, nor can any presumption against the right of support be indulged. Every reasonable presumption and intendment in its favor must be recognized, if the law is to be applied in accordance with the latest and most authoritative expositions thereof.

In order to show the relevancy of some portions of the foregoing opinion and of my original dissenting opinion, it becomes necessary for me to call attention here to changes that have been made, on the rehearing, in the opinion originally filed by the majority of the Court on the decision of the case.

After the question, "Why should a different rule prevail when a contract is for the sale of mineral below the surface?" found in that part of Judge Mason's opinion which was adopted in the opinion of JUDGE MCWHORTER, the following language was, on the petition for rehearing, stricken out of the part originally quoted and adopted:

"None are suggested by counsel, except that the courts of England have established a differed rule, and many of the American courts have followed these decisions. While these

decisions do not have the force of law in this State, yet they are of such character as to deserve the careful consideration of the courts. They are persuasive but are not conclusive arguments, especially should it be found that one simply leans on the other."

After the citation of *Noonan* v. *Pardee*, 200 Pa. St., all of the following was eliminated from the part of Judge Mason's opinion which originally appeared in the opinion of JUDGE MCWHORTER:

"The learned Judge in delivering the opinion of the court in this case said, 'Of course the defendant has a right to all the coal under his lot, but he had no right to take any of it if thereby necessarily the surface caved in. The measure of his enjoyment of his right must be determined by the measure of his absolute duty to the owner of the surface.' This is the English rule broadly and frankly stated, and the one which a large number of American courts have rigidly followed without question.

"So far as I have been able to ascertain the first American case announcing this rule was decided by the Supreme Court of Pennsylvania in 1871. Without giving any substantial reasons for the opinion the learned judge says, 'The English cases referred to and others which might be referred to emanate from great ability, and from a country in which mining, its consequences and effects are more practical, and the experience greater than in any other country of which we possess any knowledge. We think it safe, therefore, to follow its lead in this matter.' *Jones* v. *Wagner*, 66 Pa. State 429; 5 American Rep. 385. There are a number of other cases in Pennsylvania decided the same way.

"The same rule has been adopted in Alabama. See *Williams* v. *Gibson*, 84 Ala. 228; 5 Am. State Rep. 368, decided in 1887.

"In the case of *Marvin* v. *Brewster Iron Mining Company*, decided in 1874, and reported in 55 N. Y. 538 and 14 Am. Rep. 322, the supreme court of that state recognized this rule. See also *Ryckman* v. *Gillis*, 57 N. Y. 68 and 15 Am. Rep. 464.

"The Supreme Court of Indiana has adopted this rule in the case of *Yanders* v. *Wright*, 66 Ind. 319, also 32 Am. Rep. 109, decided in 1879.

"The same rule is adopted by the Supreme Court of Illinois. See case of *Wilms* v. *Jess*, 94 Ill. 464, and 34 Am. Rep. 242, decided in 1880.

"The supreme court of Iowa has not only approved this rule but has gone a step further and held that when one conveys land to another reserving the right to remove the underlying coal if necessary to support the surface of the soil he must leave the pillars or ribs of coal, although the reservation exempted him from any liability for injury to the surface of the land by reason of the mining operations. See *Livingston* v. *Moingona Coal Company*, 49 Iowa 369; also 31 Am. Rep. 150, decided in 1873.

"It must be conceded that plaintiff's contention is supported by many of the best American and English courts. But it will be found upon careful examination of the decisions of the American courts that they have been contented with following the dicta of the English courts. The Pennsylvania courts first adopted the English rule for the reason that the cases 'emanate from great ability, and from a country in which mining, its consequences and effects are more practical and the experience greater than in any other country of which we possess any knowledge.' And hence the court declared 'we think it safe to follow its lead.' This was the first decision of this question in this country and it is still the leading case, referred to and followed by all the other American courts, and yet no better or other reason is given for it than the court thought it safe to follow the English cases. I refer to *Jones* v. *Wagner*, 66 Pa. State 429. So that while we find many American courts following the English decisions we gain nothing from the American cases, and must look to the English cases alone for the principles upon which the decisions rest."

On the petition for rehearing, the two paragraphs near the conclusion of JUDGE MCWHORTER'S opinion as it now stands, commencing, respectively, "We agree with the conclusion," and "We in no sense question," were inserted as additional matter. They did not appear in the opinion, as it was originally delivered.

WHEELING

HARVEY COAL AND COKE CO. v. DILLON, TAX COMMISSIONER.

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j62 157
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f62 349
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Submitted May 26, 1905. Decided June 16, 1905.

1. TAXATION—*Mining Lease—Chattel Real—Assessment to Lessee.*

A sealed writing witnesses that "the lessors do demise, let and lease for coal mining and coke manufacturing purposes for a period of thirty years" * * * a tract of land; and that the lessors "do also grant unto the lessee the sole and exclusive right and privilege of mining, shipping and selling the coal from the above leased premises * * and the right to erect and use all buildings and structures necessary for the purposes of mining, coking and shipping the coal and coke;" and also that "it is expressly agreed between the respective parties to this lease that if at the expiration of the said period of thirty years, all of the available merchantable coal which can be profitably mined, and which is hereby let to the lessee for that purpose, has not been mined and removed, then the lessee shall have the privilege of an extension of this lease upon the same terms and conditions as those hereinbefore set forth, for a reasonable additional time until the whole of said coal can be so mined and removed." The writing provided for a rent or royalty to the lessors of ten cents a ton for all coal mined, and also contained a clause of forfeiture for noncompliance by the lessee with the covenant of the writing. *Held*, that this writing created a lease, a chattel real, taxable to the lessee under chapter 35, Acts of 1905. (p. 609.)

2. SAME—*Double Taxation.*

Chapter 35, Acts of 1905, in its taxation of chattels real, is not in violation, as double taxation, or otherwise, of the State Constitution. (p. 633.)

3. CONSTITUTIONAL LAW—*Due Process of Law—Equal Protection of Laws—Taxation of Lease as Personalty.*

Chapter 35, Acts of 1905, is not in violation of amendment 14 of the National Constitution, as wanting due process of law, or denying equal protection of the law. (p. 638.)

Appeal from Circuit Court, Fayette County.

Bill by the Harvey Coal & Coke Company against C. W. Dillon, tax commissioner, and others. Decree for defendants and plaintiff appeals.

Affirmed.

ST. CLAIR, WALKER & SUMMERFIELD, BROWN, JACKSON & KNIGHT, VINSON & THOMPSON, RUCKER, ANDERSON & HUGHES,

SHEPPARD & GOODYKOONTZ, and JOS. H. GAINES, for appellant.

C. W. DILLON, MOLLOHAN, MCCLINTIC & MATHEWS, and GEO. C. BAKER, for appellees.

BRANNON, PRESIDENT:

The Harvey Coal and Coke Company, a corporation, presented to the Honorable W. R. Bennett, judge of the circuit court of Fayette county, a chancery bill setting up that on the 20th of May, 1893, it made a contract with Morris Harvey and others for the purchase of all the coal in the Sewell seam in certain land, together with the right to enter upon the surface and use so much of the surface as might be required in mining, for which the company was to pay Harvey and others ten cents per ton for all coal mined; that it had actually developed the coal mine and was engaged inmining coal and making coke on the land. The bill complains that under certain legislation enacted in 1905 for the taxation of personal property C. W. Dillon, State Tax Commissioner, had issued such instructions to B. E. Bare and S. T. Carter, assessors of Fayette county, as would require them to assess said mining property under the head of chattels real, and that the assessors would assess it, and praying that said commissioner and assessors be enjoined from making such assessment, on the theory that it was unwarranted by law. The court sustained the demurrer to the bill, and dismissed it, and the plaintiff appeals.

The deed from Harvey and others to the plaintiff contains the following language: "That the lessors do demise, let and lease for coal mining and coke manufacturing purposes for a period of thirty years from and after the first day of January, 1893, the following tract or body of land lying." And the lessors "do also grant unto the lessee the sole and exclusive right and privilege of mining, shipping and selling the coal from the above leased premises from the said Sewell Seam, and the right to erect and use all buildings and structures necessary for the purposes of mining, coking and shipping the coal and coke therefrom and for all other purposes connected with or necessary for the free exercise and enjoyment of the privilege above granted or demised." "It is expressly agreed between the respective parties to this lease that if, at the ex-

piration of the period of thirty years, all of the available merchantable coal which can be profitably mined, and which is hereby let to the lessee for that purpose, has not been mined and removed, then the lessee shall have the privilege of an extension of this lease upon the same terms and conditions as those hereinbefore set forth, for a reasonable addition of time until the whole of said coal shall be so mined and removed. And it is further mutually agreed and understood that an abandonment of said premises by said lessee for a period of one year and a failure to pay royalty as hereinbefore provided for that period, then said lessee shall forfeit all right to said premises." The question of equity jurisdiction was waived, and is not considered.

This is a very important case. It is vastly important to the State, as it involves large revenue imposed by recent legislation, and the construction and even validity of that legislation. The Tax Commissioner claims that there is a value of $200,000,000.00 in leaseholds in this State, which has never been charged with taxes. That these leaseholds involve great value is not denied. So also it is of great importance to the owners of leaseholds, as it imposes upon them taxation. Able and elaborate oral and printed arguments by distinguished counsel demand that we write a perhaps too lengthy opinion, as well also does the gravity of the case.

As to the State's power of taxation. In *Loan Association* v. *Topeka*, 20 Wall. 655, it is asserted that "The power to tax is the strongest, the most pervading, of all the powers of the government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall in *McCulloch* v. *State of Maryland*, 4 Wheaton 431, that the "power to tax is the power to destroy." "The power to impose taxes is one so unlimited in force, so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it." Justice Field said in *State Tax on Foreign-Held Bonds*, 15 Wall. 319, as follows: "It may touch property in every shape—in its natural condition, in its manufactured form, and in its varied transmutation—it may touch business in the almost infinite forms in which it is conducted—in professions, in commerce, in manufactures, in transportation." Cooley on Taxa-

tion, 9, says: "Everything to which the legislative power extends may be the subject of taxation, whether it be person or property or franchise or privilege or occupation or right. Nothing but special constitutional limitation from legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the legislature in its discretion shall select it for revenue purposes; and not only is the power unlimited in its reach as to subjects, but in its very nature it acknowledges no limitation, and may be carried even to the extent of exhaustion, thus becoming in its exercise a power to destroy."

In May or June, 1905, the Supreme Court of the United States decided the case known as the New York Franchise Tax Case, and sustained the constitutionality of an act taxing the franchises of corporations. The case asserts again very wide powers of taxation in the states. I have not the text of the case. *People* v. *Tax Commissioners*, 25 Sup. Ct. R. 705. In it Justice Brewer delivered the opinion holding that the intangible assets of a corporation are subject to taxation, and that corporations owning franchises must contribute their share to the expense of government. Justice Brewer said in delivering the opinion for the court: "We had occasion to review this subject in the Adams Express case versus Ohio, where we said: 'In the complex civilization of today a large proportion of the wealth of a community consists in intangible property, and there is nothing in the nature of things, or in the limitations of the federal constitution, which restrains the state from taxing at its real value such intangible property. It matters not in what the intangible property consists, whether privileges, corporate franchises, contracts or obligations. It is enough that it is property which, though intangible, exists, which has value, produces income, and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country."

The Constitution of this State gives the legislature power, indeed, a mandate, to "tax all property, real and personal." Therefore, the question is material, Does the deed in this case vest what is in law property in the Harvey Coal Company? The very suit in itself is a concession by the company

that its right under said deed is property, because that suit is to defend that property against taxes. But aside from such concession, it is quite plain that the Company's right is a property right. Anything capable of beneficial ownership is property. In this instance a valuable right arising by contract; a right to take coal from the body of land, using the land for that purpose, and convert it into saleable coal, a commodity of great commercial value. "Man's rights in respect to things constitutes property." 2 Minor's Inst. 1. The Company's right to produce commercial, merchantable coal for market and manufacture coke is a right in respect to the land, and that mere right, under the contract, is property. The sole and despotic dominion which one man claims and exercises over external things of the world, in total exclusion of the rights of any other, is property. 2 Bl. Com. 2. The right to possess, use, enjoy and dispose of a thing is property which is in itself valuable. 4 McLean, 603; Bouvier L. Dic. word "property." A mining right in government land is property in the miner, and property of value, and may be taxed by the state, and the state may sell it for taxes. *Forbes* v. *Gray*, 94 U. S. 762. I repeat that plainly the right vested in the Coal Company, and being actually exercised, is property, and the legislature has full power to tax it in some manner. Except as restrained by the Constitution the State may tax without limit as to subject or rate. We need not discuss the power to tax this property, as the Constitution gives it. In what manner shall it be taxed, as real or personal property? The legislature has enacted that all property, real and personal shall be taxed. The Tax Commissioner claims in behalf of the State that this mining right is personal property, and of that kind called by the law chattels real, and as section 61 of chapter 35, Acts 1905, defines "personal property" as including chattels real, and other sections direct their taxation, his direction to assessors is to tax chattels real as personalty, and the assessor will charge the said right of the Company. The company claims that its right is not a chattel real, not personalty, but real estate, and cannot be charged to it as personal property, but can be charged only as real estate to the owner of the land itself, and that the charge of the tax to the owner covers, includes the right of the company. As the act declares that personal

property shall be taxed, if the Company's right is a chattel real, which always has been regarded in law as personal property, briefs in the case argue that that is alone a warrant to charge the leasehold; but if it is a chattel real, we do not have to pass on that question, because the statute, as we hold, expressly taxes chattels real. What then is the character of that property conferred upon the defendant by its deed? A freehold is an estate for life or in fee; a chattel real for a less estate. Volume 22 Am. & Eng. Enc. of Law, 2 Ed. defines it thus: "An estate in land other than one for life or inheritance." Tucker's Com. 2, p. 305, defines chattels real thus: "Chattels real," saith Sir Edward Coke, "are such as concern, or savour of the realty: as terms for years of land, wardships in chivalry (while the military tenures subsisted,) the next presentation to a church, estates by a statute merchant, statutes-staple, elegit, or the like; of all which we have already spoken. And these are called real chattels, as being interests issuing out of, or annexed to, real estate: of which they have one quality, viz., immobility, which denominates them *real*, but want the other, viz: a sufficient legal, indeterminate duration; and this want it is that constitutes them *chattels*. The utmost period for which they can last is fixed and determinate, either for such a space of time certain, or until such a particular sum of money be raised out of such a particular income; so that they are not equal in the eye of the law to the lowest estate of freehold, a lease for another's life." See 7 Cyc. 123. Bouvier's Law Dictionary says: "Real chattels are interests which are annexed to or concern real estate, as a lease for years of land. And the duration of the lease is immaterial, whether it be for one or a thousand years, provided there be a certainty about it, and a reversion or remainder in some person." A lease is defined by Bouvier to be "A species of contract for the possession and profits of lands and tenements either for life or for a term of years or during the pleasure of the parties. A conveyance by way of demise always for a less term than the party conveying has in the premises. One of the essential features is that its duration must be for a shorter period than the duration of the interests of the lessor in the land, for if he disposes of his entire interest it becomes an assignment, and is not a lease. In other words, the granting of a lease

always supposes that the grantor reserves to himself a reversion." In 18 Am. & Eng. Enc. of Law, (2 Ed). 597, we find a lease defined thus: "A lease is a contract for the possession and profits of lands and tenements on the one side and the recompense or rents on the other, or in other words, a conveyance to a person for life, years or at will, in consideration of a rent, or other recompense."

Try this property or right under these definitions. It is surely a lease, and therefore a chattel real. The fee owner carves out of his fee a particular estate and vests it in another. The coal having been developed, then, if not before, an actual estate vested as to the coal right, an entity, a distinct entity, a separate property from that remaining in the lessor. The instrument of conveyance gave certain title to the Coal Company, gave it an intangible right, that is, a right to produce personal property, a product of the land. This right savored of the realty, depended on it, was annexed to it, and so far answers the definition of a chattel real, which is personal estate. We say that the estate of the coal company is a lease for years, and if so, by all authority, is a chattel real. The parties thought they were making a lease for years, intended to do so, so far as we may judge from legal language, for they used the words of lease signification, "demise, lease and let." The instrument calls itself a lease and calls the parties lessor and lessee. But take the document itself. It leases the tract for "a period of thirty years," not forever. It has a specific term, gives an estate less than the fee of the lessors, leaving the whole tract at the end of the term to revert to the lessors disencumbered and freed from the leasehold estate, thus meeting another element in the definition of a chattel real, that is, that it must be of less duration than the estate of the lessor. In this case all the features of a lease for years are present, leasing language, a term, a rent, forfeiture and reversion. A grant giving right to mine lead was held to be a lease in *U. S.* v. *Gratiat*, 14 Pet. 538—pointed authority in this case. The case holds that, "The legal understanding of a lease for years is a contract for the possession and profits of land for a determinate period, with the recompense of rent. It is not necessary that the rent should be in money. If reserved in kind, it is rent in contemplation of law." And I notice that the very language of the lease is

that it lets the coal. As the court said in *Reynold* v. *Hanna*, 55 Fed. 783: "In the present case the term is sufficiently definite. Subject to its sooner termination under the forfeiture clause of the contract, it is to continue so long as there is coal that can be practically mined. This constitutes a *determinate* period." The limit of thirty years gives it a definite period; but the argument is made that the lease says that if the seam of coal should not be fully taken out within that time, then the lessee should have "the privilege of an extension of the lease." Now, this does not give a forever extension to last as long as the lessor's estate; it is an extension for a reasonable time, that is, only such time as reasonably necessary to remove the coal. The land was not to be under servitude forever. And what seems to me to answer this argument is, that the extension is merely an *option*, on the part of the company, not an extension at all events, not a further estate at all events. This extension clause does not make the estate a freehold, and cannot convert the grant from the character of a lease for years to an enduring estate. There comes a time when the right of the coal company must end, leaving the fee in the lessors relieved of the leasehold, even if there shall be an extension. The coal must exhaust. I repeat that the extension clause does not take from the estate the character of a lease. In *State* v. *South Penn Oil Co.*, 42 W. Va. p. 102, this Court said: "Nor does the addition to the term of years of the clause 'and as long as oil or gas may be found in paying quantities,' give it such indefinite duration as to make the interest freehold in quantity; for after the expiration of the term prescribed the lessee, having the option to continue to pump if he can find oil in paying quantities, becomes a tenant at will, which may become a tenancy from year to year on the terms of the lease, but it is not a freehold, because its extension after the end of the term prescribed depends upon his own act, the exercise of his own will; so, according to the terms of the instrument, that is as large an interest as the words will bear. Such superadded possibility of extended duration constitutes no part of the term of years prescribed, but is a new interest in the nature of an option to become tenant at will or from year to year by the exercise of his own volition when the fixed term of years shall have expired. He has but a contract with the owner of

the land for the possession. He is not seized of any part of the ownership of the land by any title." "A grant of land to mine for coal so long as there was coal to mine, with leave to take under certain conditions all the coal in the land, and also containing covenants and a provision of forfeiture in case of noncompliance, was construed a lease." *Gartside* v. *Outley*, 58 Ill. 210. A lease for ninety-nine years, renewable forever, by common law is only a chattel. 5 Am. & Eng. Enc. of Law, 1024. The grant is only until all the coal be mined—in character like a lease until out of the profits a debt shall be paid, and that is a chattel real by the definitions above given. "It seems to be regarded as essential to a good lease for years that it should be either for a certain period, measured by years, or for a period uncertain only from the circumstance that it may be determined before its natural expiration by some event, or by having a purpose which of itself serves to ascertain the length of time for which the premises are to be held." 1st. Washburn, R. P. sec. 211. The present is a mere lease under this authority.

It is said, however, that when the coal shall be exhausted there will be nothing to revert to the land owner, and that this repels the idea that the right of the company is a chattel real, as there must be a reversion or remainder to make a chattel real. The answer is that the grant is not of the very coal. The phrase of the deed is not that. It *leases* the coal. It lets the tract itself to be used for a special limited purpose. It gives an intangible, incorporeal thing, a right to take actual possession of the tract and use it so far as necessary to take coal and make coke. When the term in this intangible right savoring of the land ends that is at an end, not the mere coal. There are many cases bearing on the subject, and somewhat clashing. In this, as in most other cases, there is a wilderness of decisions, and it is impossible in an opinion to attempt to analyze them. The best a court can do in the great volume of conflicting cases is to select those which, in its judgment, best suit the particular case as a basis of decision for that case. An agreement conveying all coal in a tract with right to remove for fifty years was termed a lease. *Hyatt* v. *Vincennes*, 113 U. S. 408: "The possession by the citizen of, and his possessory interest in, the public land for mining, agricultural, or other purposes, constitutes a species

of property recognized by law, and is a subject of taxation by the State." *People* v. *Shearer*, 30 Cal. 645. "An instrument which conveys premises to the grantee for the purpose of mining coal 'so long as there is coal to mine thereon,' and providing for a payment of bank rents therefor, and with a forfeiting clause in case of noncompliance with the terms of the instrument is a lease." *Gartside* v. *Outley*, 58 Ill. 210. In *Haywood* v. *Fullmore*, 32 N. E. 574, the construction was involved of a writing which acknowledged receipt of one hundred and seventy-five dollars in payment of a sand bar for the year 1890, and recited that it was for the exclusive right to all gravel and sand for that year, and excluded all other parties from the premises. The question was whether it was a lease, a license, an executory agreement or any interest in the sand bar. The court said: "A lease may not only confer upon the lessee the right to the occupancy of the leased premises, either generally, or for the land, or for some specific purpose, or in some specific manner or the right to occupy and cultivate and remove products of cultivation; but it may confer upon him the power to occupy and remove a portion of that which constitutes the land itself. Similar and common examples of such leases are those authorizing a lessee to quarry and remove stone, to open mines and remove ores, minerals, coal, or to sink wells for procuring and removing petroleum and natural gas. The power to execute leases for such purposes and the fact that the instrument by which such interest in land is granted may be in all essential particulars a lease, will not be questioned. Manifestly there can be no valid reason why a lease may not confer the right to remove a portion of the soil, or of sand and gravel found upon the surface of the land, as well as to remove stone or iron ore or mineral coal found either upon the surface or beneath it. In our opinion the writing in question contains all the essential elements of a valid lease." In this case the Indiana court did not think that the fact that a part of the substance of the soil was to be removed gave it any other cast than that of a lease. It likened it to an agricultural lease. I see no reason to discriminate an agricultural lease from this lease, so far as that the one is as much a lease, a mere chattel interest, as the other. In *Reynolds* v. *Hanna*, 55 Fed. it is held as follows: "By an agreement between the executor of an estate and a coal

company the executor granted exclusive right to enter upon, mine, and remove the coal in the premises and the right to occupy and use so much of the surface as would enable the company to conduct mining operations, and to make use of so much of the timber as might be necessary in mining; the company agreed to mine the coal for a certain compensation, a royalty, and if the company failed to make payments this lease may, at the option of the first party be declared forfeited, and it was held that the agreement was a lease and the royalty was a rental." That is much like this case. A memorandum leasing all the coal in a parcel of land was held to be a lease in *Genet* v. *Delaware*, 136 N. Y. 593. An instrument conveying an interest in land for a certain time with the exclusive right to mine, the grantee paying a rent in ore, was held to be a lease in *Lehigh Zinc Co.* v. *Bamford*, 150 U. S. 665; 14 Sup. 219. In *Bluestone Coal Co.* v. *Bell*, 38 W. Va. 297, a right to mine coal was held to be a lease. The court in *Genet* v. *Delaware*, 136 N. Y. 593, declared that the instrument did not convey the coal itself, and that its subject matter was mineral product, not land. And in *Bowyer* v. *Seymour*, 13 W. Va. 12, an instrument read: "Doth lease all the mineral, coal and iron ore underlying the lands," without fixing any term and providing for a royalty rent to the lessor was held to be a lease, treated only as such. A notable case is that of *State* v. *Moore*, 12 Cal. 56. The case was decided by Judges Terry, Baldwin and Field, the last afterwards a Justice of the Supreme Court. The case was maturely considered. In California mining claims were the property of the United States and not subject to taxation. The Court however held that the interests of the occupants of the mining claims were a distinct species of property, severable from the mining claim of which it was a part, and that being so severable it could be assessed and taxed as the property of the owner. It was claimed that inasmuch as the mining claim, to which the miner's rights were related, was exempt that the occupant's right must also be exempt. The syllabus is as follows: "The interest of the occupant of a mining claim is property, and under the Constitution it is in the power of the legislature to tax such property. The whole course of legislation and decision in this state has recognized a qualified ownership of the mines in private individuals. The

term 'property in lands' is not confined to title in fee, but is sufficiently comprehensive to include any usufructury interest, whether it be leasehold or mere right of possession. Several persons may have, in the same land, a property which is subject to taxation, and it is not perceived that the fact that the property of the government is exempt from taxation affects the right to tax the interest which individuals have acquired in the same property. Exemption from taxation is a privilege of the government, not an incident to the property. There is no force in the supposition that the value of a mining claim, which depends upon the amount of the metals it contains, must necessarily be left to conjecture. The universal standard of value is the amount of money that can be realized by a sale of the property, and this will apply as well to mining claims as to lands." That case also said as just stated, that the instrument created a lease and that "it is not an absolute grant of all the coal in the land." See *Moore* v. *Miller*, 8 Pa. 283. In Kentucky assessment of a leasehold estate was held to be valid. In *Wilgus* v. *Commonwealth*, 9 Bush 556, it is held: "A lease for ninety-nine years, with a provision for perpetual renewal, is personalty and is not to be listed for taxation as real estate." The Code of Alabama required that each piece of land, and each separate or special interest in it, such as mineral, should be taxed to separate owners. It was held that a lease for years for the purpose of cutting saw logs was such special interest which should be taxed. *Freeman* v. *State*, 115 Ala. 208.

Mining leases and their legal effect have often been before the courts and have generally been construed to be leases creating leaseholds, and being for a term of years and not freeholds, constituting chattels real. 5 Am. & Eng. Enc. of law (2 Ed.) 1024; *U. S.* v. *Gratiot*, 14 Pet. 526; *Consolidated Coal* v. *Peers*, 150 Ill. 344; *Pelton* v. *Minah*, 11 Mont. 281; *Young* v. *Ellis*, 91 Va. 297; *Ganter* v. *Atkinson*. 35 Wis. 48.

Those cases show mere leases, and I hold that being leases they are chattels real. But the Coal company contests the position that it has a lease taxable as personalty, as chattels real. It says that the deed shows *a sale* of the coal, and that the coal itself is taxable as real estate to the owner of the fee, and that the charge of the land to the owner of the fee covers

and pays taxes also for its coal. I have just cited a California case showing that the lease does not convey the coal. The plaintiff bases its theory that it does not own a chattel real taxable as personalty to it on certain Pennsylvania cases, and cites them with confidence. A leading Pennsylvania case is *Sanderson* v. *Scranton*, 105 Pa. St. 469, holding that an agreement leasing "all the coal beneath the surface, with right to remove the same," with no term fixed in the instrument, it saying that "the true meaning of this lease is to be perpetual until all the coal under the tract of land herein described is mined," conveyed an interest in land. The court gave emphasis to this clause, saying that the lease was not for years, life or will, and therefore held it a conveyance of the very coal. In *Montooth* v. *Gamble*, 123 Pa. 240, the deed said, "sell and convey unto the parties of the second part all the bituminous or stone coal in or under" a tract. So in *Lazarus' Case*, 145 Pa. St. 1. Such is not our case. The deed in our case grants the tract for a specific purpose, that is, with the right to mine coal, and make coke, and does not grant even the coal itself; whereas the Pennsylvania cases show deeds granting, not the land, not the tract, but all the coal. The court of appeals of New York in *Genet* v. *Delaware Coal*, 136 N. Y. 602, referred to the Pennsylvania cases and said: "Whatever we may think of the general doctrine one thing about it is quite obvious. It applies to a case, and only to a case, in which by the terms of the agreement and in contemplation of the parties the whole body of the coal, considered as of cubical dimensions and capable of descriptive separation from the earth above and around it, and as it lies in its place, is absolutely and presently conveyed. The thing sold must be such that it can be identified as land and severed as land from the estate of which it forms a part. Every case upholding the doctrine which I have been able to examine has that marked characteristic," and citing the cases. The court held a deed saying "doth hereby lease all the coal contained in" a tract to be a lease and that it did not operate as a conveyance of the coal veins or strata.

It seems that the above Pennsylvania cases holding that an oil or coal lease conveys an interest in the land conflicts with other Pennsylvania cases holding them to create a chattel interest saleable on execution. In *Brown* v. *Beecher*, 120 Pa.

St. 590, we find this point of law decided: "A demise of land for a term of years, 'with the sole and exclusive right and privilege during said period of digging and boring for oil and other minerals, and of gathering and collecting the same therefrom,' conveys an interest in the land, a chattel real, but none the less a chattel." See Desty on Taxation. 176. Grant, for argument, that it is the sale of an interest in land, still that Pennsylvania case, which cited others to the same effect in the syllabus, says that it is none the less a chattel real. Thus, even if it conveys an interest in land, it is a chattel interest, and this blasts the inference sought to be made from the Pennsylvania cases that this leasehold passes realty, an interest in the land, and must be taxed as such. and that to the fee owner. We can find plenty of authority that a state may tax land as personalty, or leasehold as personalty or realty, as its statutes may prescribe. This being a leasehold by common law, and being personal property by common law, is enough; but in addition the statute of 1905 declares that it shall be taxed as chattel real. And the Pennsylvania cases, which counsel for the plaintiff cite to show that this lease or document conveys the very coal or an interest in the land, are not consistent with other Pennsylvania cases. *Venture Oil Co.* v. *Frett*, 152 Pa. St. 451, involved a deed which "granted, demised and let, for the sole and only purpose of mining and excavating for petroleum," a tract of land for royalty for twenty years, and the court carefully considered its character and said: "The contract does not purport to be a sale of all the oil under the farm, but a grant of the right to mine and remove oil for a fixed period." If oil should be found, "the contract took effect as an oil lease, and the lessee had a right to operate the land for the production of petroleum." So in *McNish* v. *Stone*, 152 Pa. St. 457, foot note, the deed said "do lease unto the party of the second part the exclusive right to bore or mine for seneca oil or other minerals" on described land for ninety-nine years. The court said that the contract was "not a grant of the mineral in place or under the land," and that if oil was found "the right or interest is an incorporeal one." The court held that it was a lease. See also *Funk*, 53 Pa. St. 229; *Duffield*, 129 *Id.* 94; *Thompson*, 101 *Id.* p. 232. I have already cited numerous cases contrary to the Pennsylvania

cases showing that mining contracts like that involved in this case are held to be leases, not sales. The West Virginia cases held them leases. The case of *Boyer* v. *Seymour*, 13 W. Va. 12, already cited, attests this, and also *Bluestone Company* v. *Bell*, 38 W. Va. 297. The last case involved a lease of ninety-nine years. A contract leased all coal under tracts of land with right to go on the land to develop coal and also cut timber for mining use for ten cents per ton of coal payable to the lessor. It fixed no term. It was treated as a lease, a chattel real, and for that reason right to tax it as realty to the lessee was denied. The company lessee had done nothing under the lease. No estate had vested in it. It was not treated as *a sale* of the coal but as a mere lease, and the coal chargeable to the land owner. If it was a sale, why not charge the lessee? It was expressly decided that because it was not a conveyance of a freehold in the coal, but a mere lease, it could not, under the revaluation act of 1891, be charged to the lessee; whereas if it had been a sale outright of the coal it would be otherwise. This is strong to show that it was, though no term was fixed, not a sale. It was declared a lease in words. The land could be chargeable only to one holding a freehold for life or in fee. *U. S. Coal Co.* v. *Randolph County*, 38 W. Va. 201. A lease of a tract for mining coal, for ten cents per ton royalty, was treated as a lease in *Coaldale Co.* v. *Clark*, 43 W. Va. 84. Take the case of *State* v. *South Penn Oil Co.*, 42 W. Va. 80. It holds that a privilege, liberty or license to search and explore the land for oil or other minerals, coupled with a grant to dig and remove them and convert them to the grantee's use, if in fee or for life, creates an incorporeal freehold right in the real estate which must be assessed to the grantee separately from the land, if minerals be found or produced, "but such privilege, liberty or license, and such interest, if limited to a term of years, are not held and owned as the whole or a part of the freehold ownership, within the meaning of the act. and should not be separately assessed to the mining lessee on such land books." In *Peterson* v. *Hall*, 50 S. E. p. 606, we again said, the oil lessee "had no estate in soil or minerals." The act referred to was the revaluation act of 1891. This South Penn case shows (1) that a lease of a tract for mineral development, for life, fee or term of

years is not a sale or conveyance of the land or mineral, but confers an intangible or incorporeal estate, in connection with the land, a right issuing out of it. And (2) that if for life or fee it was taxable to the grantee of that incorporeal right, because the act of 1891 provided that if minerals were owned by any one exclusive of the surface, they should be charged separately from the surface to the one owning them. The lessee was by the act held to be owner. But if the mineral right were less than for life, the mineral should be considered still as part of the land, and when the land was charged should not be charged to the lessee; that it was not real estate and could not be charged to the grantee, because land by our law could only be charged to the freehold owner, and this shows that it was, not a sale or transfer of the very mineral, but of only a right to use the land to convert the mineral to personalty by severance from the body of the land. The case pointedly says that the coal itself was not sold. The court said: "A lessee, in the proper sense, may, by contract, have right to possession, and the possession, of the coal, as a part of the thing to which the ownership applies, but no part of the thing owned is vested in him; and the statute contemplates a case in which the other party has become the owner of the mineral or coal and holds it as such owner. And in that common law sense, adopted by the general assessment law, the ownership to be assessed cannot be divided into parts less in quantity than freehold." The statute charged land only to the freehold owner. Just as I have once said above in this case the Coal Company has right of possession of the coal, and of the land to mine that coal, but no title to the very coal or land—only a right to coal in connection with the intangible right to produce coal, to make it personal property for market. These leases, in the plain import, mean that the surface owner owns the whole land and everything in place in it, and that the lessee simply has a usufructuary right in connection with the land, right to use the land for a purpose, a terminable right, which may be long or short in years, that is a mere chattel real, issuing out of land, but constituting a distinct estate, a valuable one as property, and which is property, and therefore taxable, if the state see proper to do so. It must be a mere leasehold, a chattel real. Not being a freehold, and being incorporeal, a mere right to use the land for a purpose, what can it be but

a leasehold for years? It must be something, in the legal eye; it cannot be nondescript. The court in the case referred to last did not say whether or no that chattel real could be taxed as personal property under the statute providing that all personal property should be assessed annually, as that statute was not involved in the case, but only the act of 1891 for the revaluation of land. And note that the court's opinion on page 104 uses this plain and emphatic language, which we borrow and now announce as law, though it was then *obiter*, namely: "If the State sees fit to tax this kind of personal property, then it can be distrained and sold like other personal property." As further showing that such a lease is not a sale of the coal itself, but confers a leasehold for years taxable as personalty, I will add that the oil and gas leases used in this state demise a tract of land for the purpose of developing and taking oil and gas for a fraction of the oil as royalty, and for a fixed sum per gas well, to the lessor, for a specific term of years and as much longer as oil and gas can be produced in paying quantities, and they have always been treated and deemed to be leases, not grants of the minerals in specie. *Boyer* v. *Seymour*, 13 W. Va. 12, was a lease for all coal in a tract with no definite term. It was treated as a lease, just as an agricultural lease. What the difference? We have always thought that these instruments, whatever their form, since they only give right to produce mineral out of the fee owner's soil, leaving him to all intents still the owner of the land and all minerals still in the ground, though the land may be leased, were simple leases, conveying chattel interest, and we believe that many cases give that cast and stamp to them, and do not consider them as conveyances of the body of the coal or oil, when not in fee. *Williamson* v. *Jones*, 39 W. Va. 231; *Betman* v. *Harness*, 42 W. Va, 433: *Williamson* v. *Jones*, 43 W. Va. 562; *Wilson* v. *Youst*, 43 W. Va. 826; *Steelsmith* v. *Gartland*, 45 W. Va. 27; *Trees* v. *Eclipse Co.*, 47 W. Va. 107; *Lawson* v. *Kirchner*, 50 W. Va. 344; *Lowther* v. *Miller-Sipley Co.*, 53 W. Va. 501; *Haskell* v. *Sutton*, 53 W. Va. 206; *Peterson* v. *Hall*, 57 W. Va. 535 (50 S. E. 603). These leases have even after production been held to still leave the oil and gas *in situ* in the ownership of the lessor, and not to be taxed to the lessee as real estate; I say as real estate. This shows

that these instruments do not convey the oil and gas. The cases have held that they cannot be taxed as realty; but they do not pass on their taxability as personal property. Our tax laws long have provided that all personal property shall be taxed; but these leases for coal, oil and gas have never been taxed on the personal property book in the past, and the question of their taxability has never arisen. Until chapter 35, Acts 1905, the tax laws did not include chattels real as specific subjects of taxation. Various decisions like *Peterson* v. *Hall*, 57 W. Va. 535 (50 S. E. 603), hold that coal, oil and gas in place were taxable to the surface owner, or rather not separately taxed, not taxable to the lessee, and thence it is urgently pressed in argument that the decisions have excluded all idea of taxation of them either as realty or personalty to the lessee. I repeat that the question of taxation of the leasehold, as such, has never been up under former laws. In *Carter* v. *County Court*, 45 W. Va. 806, a tax charge was made on ninety producing oil wells on the personal property tax book, and it was held illegal taxation. It was said to be an assessment on future production of oil, and the court regarded it as a tax *on oil* in its place still in the earth, and as all cases had held such oil real estate, there was no law to assess it as personalty. Now, this was not an assessment of that intangible chattel real, the leasehold. That case is no authority against this tax act of 1905. Whether the distinction seems refined or not, it is real in legal thought, for a leasehold is not the wheat or corn produced under the right conferred by the lease; the lease is a thing apart from the commodities produced under the right conferred by it. The common law has always recognized chattels real as distinct property, taxable if the legislature should so direct, and therefore this distinction is not new or unheard of or refined; I mean the discrimination of the leasehold from the fee ownership out of which it issues. The law has always recognized it. A chattel real is a thing of property, in and of itself, known to the law through centuries, and is not the coal, oil, wheat or corn produced from the soil by virtue of the right arising from it. They are realty while attached to the land, personalty when severed. The leasehold is an entity *per se*, not an empty shadow or gauze: So, the case of *Carter* v. *Tyler County*, and other cases holding that oil in place is in-

cluded in the charge of the land to the owner, and cannot be charged to the lessee of oil right, do not solve the question, whether, under the tax law before that of 1905, such a lease was taxable under the general direction of the statute taxing all personal property. Before 1905 the statute did not expressly charge chattels real as personal property, as does the act of 1905. True, the Code, chapter 13, section 17, clauses 15 and 16, says, "The word 'personal estate' or 'personal property' include goods, chattels, real and personal, money credits, investments and the evidence thereof." "The word 'land' or 'lands' and the words 'real estate' or 'real property' include lands, tenaments and hereditaments, and all rights thereto and interests therein except chattel interests." This shows that chattels real were never land, but personal property. From these clauses it may be argued that chattels real were taxable as personal property, especially as chapter 29, section 48, taxed "All personal property." It may be so. We do not say, as we are not passing on the prior law. It may be said against the taxation of chattels real under the old law, that the clause quoted above making chattels real personal property is only applicable to the construction of statutes in general, and as the tax chapter does not in terms name chattels real for taxation those clauses do not apply. The Code before 1905, in chapter 29, section 61, relating to taxes, says that "the words 'personal property' as used in this chapter, shall include all fixtures attached to land, if not included in the valuation of such land entered in the proper land book; all things of value movable and tangible, which are the subject of ownership; and moneys, credits and investments, as defined in the following section." Acts 1904, page 56. Chapter 35, Acts of 1905, makes section 61 of chapter 29 of the Code read thus: "The words 'personal property,' used in this chapter, shall include all fixtures attached to land, if not included in the valuation of such land entered in the proper land book; all things of value, movable and tangible, which are the subject of ownership; *all chattels, real and personal*; all money, credits and investments as defined in the following section. The word 'land' or 'lands' and words 'real estate' or 'real property' include lands, tenements and hereditaments, and all rights thereto and interests therein, *except chattel interest and chattels real.*" It may be argued with

force that chattels real, not being "movable and tangible," and not being mentioned for taxation in section 61 of the prior law, were not taxable, as the rule of construction is that though certain words are given by the Code a general meaning in the construction of statutes, they would not have that meaning in construing a particular chapter or section which itself, for its own purposes, gives it a different or limited meaning. But we do not say as to this. We do say, however, that chattels real are in words made a subject of taxation by the letter of the act of 1905, on which this case turns. We cannot decide the case by decisions resting on a prior different statute.

Recurring to the contention that the deed in this case makes, not a chattel real, but a sale of the very coal itself, which is yet taxable to the surface only as realty, we are reminded of some of our own cases for authority for the proposition. *Wilson* v. *Youst*, 43 W. Va. 826; *Haskell* v. *Sutton*, 53 W. Va. 206; *South Penn* v. *McIntire*, 44 W. Va. 296; *Lawson* v. *Kirchner*, 50 W. Va. 344. Language is used in them incidentally to the effect that a lease allowing the lessee to remove oil "is in legal effect a sale of a portion of the land." That language began in *Wilson* v. *Youst*, as a borrow from a Pennsylvania case. See page 839 of 43 W. Va. It is only repeated in the later cases. Chief Justice Marshall long ago said, what has been accepted always since as a rule, that language in a decision must be interpreted with reference to the case in hand. Just whether such a lease was a sale of the very coal as part of the land was not in judgment in those cases, not necessary to the decisions. Standing alone that language might be construed to mean that the execution of the lease itself at once vested the mineral as part of the body of the land in the lessee; but an examination of these cases shows that this was not the court's decision, but the cases involving the right of a guardian or committee to lease the land of a ward or insane person, the court simply held that as under the operation of said leases the mineral would be taken from the land, and a portion of its body thus removed, it decided that such leases so operating to work a sale and severance of part of the land from the ward or insane person could only be made in the mode authorized by law, that is, under the statute for the

sale of land of persons insane or infant. Again, there are so many West Virginia cases, in which the very question as to what manner of estate such leases created was directly involved in which it was held that before finding the mineral no estate whatever passed, and that even after finding mineral that mineral itself in the ground, not yet brought to the surface, is vested yet in the owner of the surface. We must say that many of our cases settle that. Then, how can it be said that such leases impart ownership in the very coal in the lessee, if it remain in the surface owner? Will you make a distinction between coal and oil? Why? It was not made in *U. S. Mining Co.* v. *County Court*, 38 W. Va. 201. It is needless to say *Peterson* v. *Hall*, 57 W. Va. 535, (56 S. E. 603,) does not touch the question before us. It simply holds, like many cases, that a lessee under an oil lease has no taxable vested estate in the oil in place, but that if it be conveyed in fee it is to be taxed separately from the surface. It logically denies the claim that the lease is a sale of the oil itself.

It was argued at bar that land is assessed as a body as land, and not the estate in it; that there may be a life estate, after it another life estate, after it a reversion or remainder, sometimes a contingent estate; and that these are not each separately charged to the owner of each. That is true, and why? Because the statute has long provided that "as to real property, the person who, by himself or tenant, has the freehold in possession, whether in fee or for life, shall be deemed the owner for the purpose of taxation." Code 1899, chapter 29, section 40. Therefore the life tenant must pay taxes during his estate, and the remainderman or reversioner only when the particular estate ends. That may be claimed as a good reason why leaseholds in the past could not be assessed, the charge of the corpus representing and paying for all the estate in the land. But suppose the statute had provided for the assessment of the life estate to the life tenant and the fee to the remainderman. Surely the legislature could have done so. 27 Am. & Eng. Enc. of Law, 609. And as reflecting a sedate purpose to *tax all leaseholds* for minerals compare the acts, not of tax assessment, but of revaluation of 1891, chapter 36, section 4, of 1899, chapter 21, section 4, and of 1904,

chapter 15, sections 5 and 6. The acts of 1891 and 1899 required the commissioner "to ascertain and assess the fair cash value thereof (the tract) and in such assessment minerals, mineral waters, oils and gases underlying the surface and the location of the land, shall be considered in ascertaining the value of such land in current money; and when mineral, mineral water, oil, gas or coal privileges or interests are held by a party or parties, or any company or association, exclusive of the surface, the same shall be assessed separately to such party or parties; company or association." Under that act of 1891, the same as 1899, this Court said that the minerals here meant were only freehold and the less leasehold was not separately charged, but the land must be charged to its owner. *State* v. *South Penn*, 42 W. Va. 80; *U. S. Coal Co.* v. *County Court*, 38 W. Va. 201. Remember that those cases were under the acts of 1891 and 1899, not under the assessment act of 1905. So *Carter* v. *County Court*, 45 W. Va. 811, and *Peterson* v. *Hall*, 57 W. Va. 535, (50 S. E. 603), were upon the same assessment act. They afford no guidance under later and different acts. The revaluation act of 1904 uses different language from the acts of 1891 and 1899. The legislature by the revaluation act of 1904, after requiring minerals to be considered in the valuation for taxes, said in section 6, "In case the whole or any interest in the minerals, mineral waters, oil, gases, coal, ore or timber, or any other assessable interest in real estate be held by any person other than the owner of the other interest in said real estate, the same shall be assessed separately in the name of the owner thereof." Now, here is a change and it speaks intent plain. It tells us that no longer can it be said as held in the cases above cited, that only freehold minerals are taxable separately, but the act says, "the whole of or any interest in the minerals * * * or any other assessable interest," shall be taxed to each owner, and a few months later came the act of 1905 taxing chattels real in very words several times repeated, and taxing them to their owner as personal property. This revaluation act of 1904, in connection with the assessment act of 1905, makes clear what the legislature means by chapter 35, taxing chattel real. Read both acts to get intent. The assessment act of 1904, chapter 4, section 54, still said that "As to real

property the person who by himself or his tenant has the freehold in his possession, whether in fee or for life, shall be deemed the owner for the purpose of taxation." Thence it is argued that still mineral estate must be taxed in the freehold estate, and that leases for mineral for less estate cannot be charged separately. That is true as to minerals in place. They are still included in the valuation of the freehold; they were always, and still are, included in the valuation of the land itself. But as to the distinct chattel real. It is not, and never was, included in the valuation of real estate. *State* v. *South Penn*, 42 W. Va. p. 99, says that the reassessment act did not relate to leases, but only to freeholds, and that the section providing that the freeholder should be deemed the owner related only to the life or fee estate; and on p. 101 we find that leaseholds could not be charged as real estate, because "a lessee, in proper sense, may by contract have right to possession of the coal, as a part of the thing to which the ownership applies, but that no part of the ownership of the thing is vested in him," that thing being the corpus and coal in place. The old law did not include leaseholds in the valuation of the land or mineral in place; neither does the new; but the new law charges chattels real as personal property. For the first time the new law selects them for taxation in words.

The real estate valuation act of 1904 required each separate interest to be valued for taxation, leaving it to the legislature to tax them as it might see fit. The tax assessment act of 1904 did not tax leaseholds separately in words, but the act of 1905 carried out the policy of separate taxation contemplated by the revaluation act of 1904, and directed them to be taxed separately as personalty. It is not now the constitutional or statute policy of this State, as is argued, to assess all that pertains to or grows out of land as land. The Constitution says that both shall be taxed, all property shall, what is land as land, what the law deems personalty as personalty. Constitution and statute taken together say so. The Constitution says all property real and personal shall be taxed. Still, without legislation, nothing can be taxed; but the legislature has enacted that real and personal property, including chattels real, shall be taxed; that any assessable interest in land shall be taxed to its owner. As above stated the statute has never in words required

chattels real to be separately assessed until the act of 1905. That makes them specific subjects of taxation. Never has there been a time when by common law a chattel real had not legal entity as an estate of value, a property, distinct from the body of land of which it savored, and therefore the State has indisputable power to tax it as such distinct property, By the very act of taxing it the legislature has given the chattel real, for purposes of taxation, distinct existence, if it had not had it before, and made it a tax subject. No matter how many estates or interests in land there may be the State can, if it chose, tax each separately. From law cited above, property in any form can be taxed. "The term property standing unqualified in a constitution with statutes designating subject of taxation includes both real and personal property, or estate, intangible as well as tangible rights of value." 27 Am. & Eng. Enc. of Law, 635; *Carroll* v. *Terry*, 4 McLean 25; *People* v. *Worthington*, 27 Ill. 171; *Primm* v. *Belleville*, 59 Ill. 142; *Tallman* v. *Treasurer*, 12 Ia. 534; *State* v. *Savage*, 91 N. W. 716. "It is entirely competent to provide for the assessment of any mere possessory right in lands, whether they are owned by the government or private individuals." Cooley on Taxation, 635. Separate estates or interests arising out of the same property may each be taxed. 27 Am. & Eng. Enc. of Law. 691. Desty on Taxation 78, says it is to be taxed to the lessee, if the legislature so enacts.

ANOTHER QUESTION.

The plaintiff contends that even conceding that its estate is a lease for years and a chattel real, the act of 1905 does not in fact tax a chattel real. We think that various parts of chapter 35, acts of 1905, amending Code chapter 29, plainly manifest an intent to tax leaseholds. Before that act chattels real were not in words mentioned for taxation; but such estates of vast value and large number, in which persons and corporations had invested hundreds of thousands of dollars of working capital or investment, not before existing, had come into existence, constituting large estates not taxed, and this fact itself tells us what must have been the purpose of the legislature in its amendment in 1905 of the prior law, as

well as in the reassessment act of 1904, and we must in construing the new legislation let that fact, the presence of these large interests, shed light on the intent. But take this new act, let it speak for itself, look at its features. Section 39, Code, chapter 29, before 1905, read thus: "Whenever any person becomes the owner of the surface and another or others become the owner of any other freehold estate in coal, oil, gas, or limestone, fireclay or other minerals or other mineral substances in or under the same, the assessor shall assess such respective estates to the respective owners thereof." So read the assessment act of 1904, p. 45. But this section was not satisfactory. The act of 1905 amended it by striking out the word "freehold." It now reads "Whenever any person becomes the owner of the surface and another or others become the owners of any other estate in the coal, oil, gas or limestone, fireclay," etc. Decisions under the old law held the separate mineral freehold included in taxation to its owner, the surface to its owner, and held the mineral lease for years not taxable to its owners as real estate, but that the surface assessment to its owner covered the mineral in place; but as just shown the act of 1905 amends the section. It omitted the word "freehold." This shows an intention to tax any estate in minerals, freehold or less than freehold, to its separate owner. If freehold, taxable as realty; if less, taxable as personalty by reason of the new section 61. The old section defined personal property so as not to include chattels real as seen above in its quotation. It did not make personal property, in terms, include chattels real; the new section does, and moreover excludes from the meaning of "land" chattels real. How can it be doubted for a moment that the intent was to tax chattels real, not as land, but as personal property? The new section inserts "chattels real" as coming within the meaning of personal property and excepts chattels real from land taxation, and new section 63, as also section 12, says that "all personal property" shall be taxed, and hence chattels real must be taxed. Was not something meant by this amendment? Section 68 requires the assessor to ascertain "all personal property." Old section 80 providing how capital in trade should be reported by the owner, required the owner to report, "(a) the amount and true and actual value of all tangible personal property used in con-

nection with such trade or business, otherwise than such as is regularly kept for sale therein." The new section added to clause (a) the words "including chattels real," thus plainly evincing a purpose to tax chattels real of a firm or individual, and tax them as personalty, which in law they have ever been. Section 108 of the prior law before 1905 prescribed a form of the personal property tax book, giving columns of different classes of personal property. It had no column for chattels real; but the act of 1905 gives them a separate heading and column in a clause first found in the act of 1905, "(pp). value of all chattels real of every person, firm, or incorporated company." Here the statute prescribes that the final act of assessment, the actual tax book against the tax payer, must charge chattels real. How can we fail to see fixed purpose to tax them?

The argument that the law provides for a return of delinquent land is without force. Cannot a tax claim be levied on a chattel real and it be sold therefor? A chattel real is personalty and saleable under execution. *Freeman* v. *Dawson*, 110 U. S. 264; 8 Enc. Pl. & Pr. 550; Donahue on Petroleum & Gas, 176; 17 Cyc. 953.

To sustain the claim that the act of 1905 does not at all tax chattels real, sections 77 and 78 are appealed to. Section 77 requires that corporations, except certain ones, shall make a report to the assessor showing the following items:

"(*a*). The amount of capital authorized to be employed by it;

(*b*). The amount of cash capital paid on each share of stock;

(*c*). The amount of money in hand or on deposit anywhere subject to its check or draft, on the first day of April of the current year;

(*d*). The amount of credits and investments other than its own capital stock held by it on said date, with their true and actual value;

(*e*). The quantity, location and true actual value of all its real estate, and the magisterial district in which it is located;

(*f*). The kinds, quantity and true value of all its tangible personal property in each magisterial district in which it is located." Section 78 directs how the items shall be entered in the tax book and then says: "The property mentioned in items (*c*), (*d*), (*e*), and (*f*), shall constitute all the property on

which any such corporation shall be liable to pay taxes." Upon that provision the plaintiff confidently asserts that it was not the intention of the legislature to tax chattels real at all or to any one. Here we have verbal conflict with plain provisions above given, and we must remember a rule vital in this connection, namely, that we must consider, not sections 77 and 78 alone, but those sections along with all other provisions bearing on the same matter. We would say that the omission of chattels real was due to inadvertence but for the fact that the bill in the legislature as passed by the House of Delegates contained the words "including chattels real" in clause (*f*), but they were stricken out by the Senate and the amendment concurred in by the House. This is held by counsel as conclusive to prove that it was not intended to put chattels real on the tax list at all, and certainly not those owned by corporations. Why, then, did not the legislature strike out "chattels real" from section 61? Why did it not strike from section 80 clause (*a*) the words "including chattels real," thus charging individuals and firms not incorporated with them? Why did it still later in the consideration of the bill insert in section 108 charging taxes a clause reading: "(pp) The value of all chattels real of every person, firm or incorporated company?" This last most explicit language flatly says that corporations shall be taxed for chattels real. Just here I would emphasize the fact that this clause is a positive command to the assessor to put chattels real of a person, firm or corporation on the *tax book*, as the last act of taxation; whereas, the report under section 77 is simply a report, only a list made by the tax payer, not binding, not so important as the act of the assessor in performing the final act of taxation. True, the clause of section 78 that no other property than that specified in section 77, taken alone, is strong; but we must get at the real purpose of the legislature, and weigh all it has said. It is blundering legislation; but we must glean the real and final purpose. It looks like the legislature intended not to tax chattels real, at least those of corporations, and later changed its mind, because in section 80 it required individuals and partnerships to be charged with them, and in clause (pp) of section 108 required the assessor to charge the value of all chattels real of every person, firm or incorporated company. It did not go back

to harmonize sections 77 and 78 with the final conclusion, perhaps because it forgot to do so. Inadvertent omission occurs in legislation as well as elsewhere. We must allow for inadvertence when plain. It plainly appears to be inadvertence here. But aside from that we must remember another important rule of statutory construction which has forcible application in this instance. We have clash between different provisions of the same act on the same matter. How shall we cut the Gordian knot and resolve the conflict? As held in *Speidel* v. *Warder*, 56 W. Va. 602, (49 S. E. 534), on authority there cited, we must take the later sections, 80 and 108 as reflecting the real last intent of the law-makers. Section 61, including chattels real in the definition of personal property, gives confirmation to this argument. So much of the statute speaks intent to tax chattels real.

But the plaintiff claims that even if chattels real are taxable to individuals, sections 77 and 78 must exempt corporations therein specified from taxes on their chattels real. We cannot yield to a construction working such partiality, inequality and unfairness. Why exempt the property of corporations? We cannot realize that the legislature so intended. However, if it did so design, no matter how plain its language, such exemption of chattels real of corporations would be baldly unconstitutional under the State Constitution, article 10, section 1, commanding "all property" to be taxed with limited exceptions therein given. So it was held in *C. & O. R. Co.* v. *Auditor*, 19 W. Va. 438; *State* v. *Buchanan*, 24 W. Va. 362. And would it not be repugnant to the 14th amendment as denying other tax payers equality before the law? It would be arbitrary classification, based on no good reason, but against good reason. We should not give a construction to the act making it violate the Constitution. True, though the Constitution does say that all property shall be taxed, it cannot be taxed until the legislature authorizes it. *Supervisors* v. *Tallant*, 96 Va. 723; *Virginia & T. R. Co.* v. *Washington*, 30 Grat. 471. This is because the Constitution, in this respect does not act of its own vigor, without an enabling act; but there is the statute saying that all property shall be taxed, and sections 55, 80 and 108 covering chattels real, authorizing their taxation. "Exemptions can be allowed only when the language is free of doubt, not where it is

doubtful." Cooley on Taxation, 356; *Vicksburg* v. *Dennis*, 116 U. S. 665.

It is insisted that tax acts must be construed strictly, and if it is doubtful whether the intent is to levy a tax on a thing, the doubt must be solved in favor of the tax payer. *Brown* v. *Commonwealth*, 98 Va. 366; *Net & Twine Co.* v. *Worthington*, 141 U. S. 474; Cooley, Taxation, 266; *Rice* v. *U. S.*, 53 Fed. 910. As a general rule that is so; but there is another rule here fitting. The Constitution positively commands that all property shall be taxed, and we must construe the statute as meant to obey the Constitution, if its words will at all allow it, and this act has a section taxing all property, and specific language covering chattels real. If there were doubt, we must rather resolve it in favor of taxing leaseholds, and "impute to the general assembly an intent to obey the constitutional mandate, if its enactments fairly admit of such construction," in the language of the court in *Hart* v. *Smith*, 159 Ind. 182, 58 L. R. A. 949. But I see no reason to invoke this presumption, as I cannot see how the statute can, with reason, be held not to tax chattels real whether of corporations or others. It would be vastly more unplausible for us to hold them not taxable than taxable. It would defeat an intent that is plain, taking the acts all in all as to this matter.

It is suggested that the statute makes no basis or measure of ascertaining the value of chattels real, and that this argues that it was not intended to tax them. I may not go too far in saying that a court has little or nothing to do with it. Valuation of chattels real is not infeasible—it can be made. For many other subjects of taxation no process of valuation is fixed by the statute. Courts and juries assess damages in much more difficult instances. That the act does not fix the method of valuation, does not invalidate it. *Erie* v. *Penn*, 21 Wall. 492.

CONSTITUTIONALITY OF THE TAX.

It is contended that taxing chattels real is contrary to the State Constitution because double taxation. Brief of one of the counsel for the plaintiff does not claim that double taxation is unconstitutional. Considering the vast power of taxation, the weight of authority seems to say that it is not void. "Since

the power of the legislature to tax is limited only by constitutional restriction, it follows that the courts cannot declare void a statute imposing double taxation unless it be in contravention of some constitutional restriction." 27 Am. & Eng. Enc. of Law, 607. I suppose that as our Constitution says that all property shall be taxed and that the taxation shall be "equal and uniform," double taxation is forbidden. 60 L. R. A. 366; *Fulkerton* v. *Bristol*, 95 Va. 1. Though some courts hold that even under such clause the capital and shares in it, one the property of the corporation, the other of individuals, may both be taxed. 60 L. R. A. 367; *Union Bank* v. *Richmond*, 94 Va. 316. But there is no double taxation in taxing leaseholds. They are distinct properties. *Bank* v. *Comrs.*, 9 Wall 353; *Owensboro* v. *Owensboro*, 173 U. S. 664; *Brady* v. *People*, 4 Wall, 459. There can be several estates or interests, each property, in a tract of land, especially can there be a chattel real savoring of it, issuing out of it. "Several persons may have in one tract of land distinct interests which are the subject of taxation, such as land and mineral rights, or land and growing trees, or land and structures thereon." 27 Am. & Eng. Enc. of Law, 640. The chattel is a separate property from the land, taking neither its title nor its soil in itself, vested in a different person, carved out of the fee, a particular estate distinct as a life estate. Always has the common law regarded it as distinct property, and of value as property. Is not the lease in this case a highly valuable asset of the corporation? Has it not a distinct property in it alone? Who can say that a conveyance of coal in fee does not create a separate property, taxable as such? Why is not a long lease vesting the lessee with right to take coal not a valuable separate property? The surface owner has lost dominion over the coal; the lessee has complete dominion. Still, each has a property, taxable distinctly, if the State elects to do so, because they are different properties, and each one ought to pay taxes on his own property. As remarked above, the legislature has made chattels real separate property for taxation. Many instances of taxation have been held not double, which might be regarded more so than in this case. In *Tennessee* v. *Whitworth*, 117 U. S. 129 the court said: "In corporations four elements of taxable value

are sometimes found: 1, franchises; 2, capital stock in the hands of a corporation; 3, corporate property; and 4, shares of the capital stock in the hands of the individual stockholders. Each of these is, under circumstances, an appropriate subject of taxation, and it is no doubt within the power of a state, when not restrained by constitutional limitation, to assess taxes upon them in a way to subject the corporation or the stockholders to double taxation." A tax on leasehold is not invalid as double because it is a distinct property from the land. In *People* v. *Cohen*, 31 Cal. 210, it is held that a tax on a claim to or possession of land is not a tax on the land. In many cases it has been held that the capital stock of a bank and the property in which it is invested, and the shares of stock may all be taxed. 60 L. R. A. 366. They are regarded separate property. Do we not tax both the debt secured by a deed of trust and the land, and the vendor's lien debt and the land, one to the creditor, the other to the land owner? "Where two persons hold different interests in the same thing each may properly be taxed, as they do not hold by the same title." 27 Am. & Eng. Enc. of Law, 609; *State* v. *Moore*, 12 Cal. 56. We may tax a horse to its owner, and the debt for which he was purchased to its owner. Incomes from property are assessed apart from the property producing the income. 1st Desty on Taxation, 202; 1 Cooley on Taxation, section 30. There is no double taxation here. "By duplicate taxation in this sense is understood the requirement that one person or any one subject of taxation shall directly contribute twice to the same burden, while other subjects of taxation belonging to the same class are required to contribute but once." Cooley on Taxation, 394. "Where the same property represents distinct values belonging to different persons, the fact that each is taxed on the value which the property represents in his hands does not constitute double taxation obnoxious to the organic law of Maryland." *United States Co.* v. *State*, 79 Md. 63. That suits this case. But suppose we say that the charge of the land to the owner includes the lessee's interest, can the lessee say that he pays doubly? What does he pay doubly? The land owner does not pay doubly, the lessee does not. Of what has the lessee right to complain? He does not pay double tax.

He is not hurt by double tax. Double tax is where the same person is twice taxed for the same thing. 60 L. R. A. 366; Desty on Taxation, 399.

We have no doubt about the legality of the tax after the year 1905. It may be claimed to be different as to that year. The revaluation acts of 1891 and 1899 required that the minerals be considered in making up the value of land, and the taxing of lands for 1905 is under the valuation made under the act of 1899, as the revaluation of land made under the act of 1904, excepting chattels real from the valuation of land, does not apply to land taxes until after 1905. Hence the leaseholder may say: "The valuation under the act of 1899 includes minerals; they are charged to the fee owner, and if my leasehold is charged, that is double taxation." Now, the cases of *Carter Oil Co.* v. *Tyler County*, 45 W. Va. 806, and *State* v. *South Penn Oil Co.*, 42 W. Va. 80, *U. S. Co.* v. *Randolph County*, 38 W. Va. 201, only held that minerals in place should be considered in fixing value of the land to its owner, and that lessees for years of coal or oil should not be taxed with their holdings as land, and did not decide that the lessee could not be taxed with them as personalty. If the land were under coal lease, the chattel was not charged to the surface owner, which is to say that it was excepted out of the valuation, because not included. The act of 1904 does in terms except chattels real; but it is only an express direction to the assessor of what already was the law, only declaratory of existing law. Both under the reassessment act of 1899 and 1904 the surface owner is taxed with the coal in the ground, because still vested in him; there is no difference between the acts as to this. The legislature in 1905 simply taxed what never had been taxed, in taxing the leaseholds of the lessee. *State* v. *South Penn*, 42 W. Va., on page 99, says this: "What, then, is the subject matter of the act of reassessment of 1891, and does the property (these oil leases) belong to such subject matter within the meaning of the act? We may expect to find the object—the main general purpose—of the act expressed in the title. The title is 'An act to provide for the reassessment of the value of all real estate within this State.' By a statutory rule of construction, the word 'land' or 'lands' and the words 'real estate' or 'real property' include

land, tenements and hereditaments, and all rights thereto and interest therein, except chattel interests, unless a different intent on the part of the legislature be apparent from the context. See Code, chapter 13, section 17, par. 15. In the assessment law the term 'property' is used not in the sense of the right of ownership, but of the thing owned, which is listed for taxation opposite the name of the owner. The context shows that oil and gas underlying the surface and within the location of land, shall be considered in ascertaining the value of such land; and when oil or gas privileges or interests are held by a party exclusive of the surface the same shall be assessed separately to such parties—the land to the one, the oil privilege to the other." The case decided, however, that chattel interests in the land should not be charged to the lessee, and they were not charged separately to the owner. It held that oil leases did not constitute real property within the meaning of the act, but the land was valued without respect to them. Just so under the reasssessment of 1904. Thus, we cannot say that the surface owner will pay or be charged with less after 1905 than for that year or any prior year. I repeat that the leaseholds never were included in the valuation to the fee owner.

The point was suggested that article 13 of the State Constitution forfeits lands for omission from the tax books for five years, and that an omission of the land in the fee owner's name forfeits the land, and along with it the leasehold. We do not see how this can make the act unconstitutional or how it can bear upon that point, this remote contingency. It is not to be contemplated. It is only a risk in the future assumed by the lessee when he takes his lease. May not the State forfeit for failure to pay taxes on the body of the land? The State need not look out for that. That comes from the omission of the parties interested. A mortgage would be likewise lost. It is the duty, not only of the surface owner, but of the owner of the particular estate, to protect his own estate from sale or forfeiture for taxes. We assert the right, and also the duty, of the lessee to have the public officer charge the tract in the owner's name, or his own name, for self protection. Assessment in the lessee's name would protect from forfeiture. The lessor has made an implied covenant that he will do nothing, either of omis-

sion or commission, to forfeit or destroy his tenant's estate, and the lessee can use his, or his own, name for taxation, as an assignee can.

FOURTEENTH AMENDMENT.

It is said, but does not seem to be urged by one of the plaintiff's attorneys, that the statute taxing chattels real violates the 14th amendment. Wherein we are not very clearly told. It cannot be claimed that tax laws are not due process of law. *King* v. *Mullen*, 171 U. S. 404; *State* v. *Sponaugle*, 45 W. Va. 415; *Witherspoon* v. *Duncan*, 4 Wall. 210. Does it deny equal protection of the law? Does not the act treat all persons owning chattels real alike? There surely may be taxes imposed by a state on different subjects. The right to the equal protection of the laws is not denied by a state when the same law or course of proceeding would be applied to other persons under similar circumstances and conditions. *Tinsley* v. *Anderson*, 171 U. S. 101. In many cases, such as tax laws, the legislature may classify persons and things in the administration of government. It does not follow that because one man of a class is treated differently from one of another class that the equality clause of the amendment is violated. "It only requires the same means and methods to be applied impartially to all constituents of a class, so that the law shall operate equally and uniformly upon all persons in similar circumstances." *Kentucky Railroad Tax Cases*, 115 U. S. 321. Under *Magoun* v. *Illinois*, 170 U. S. 283, and other cases, the state may classify subjects of taxation and apply different methods of valuation and taxation. The amendment prescribed no rigid equality, but permits to the descretion and wisdom of the state a wide latitude. With its impolicy the federal power has no concern. It may tax one kind of property in one way and by one process of valuation, another in another, because they do not belong to the same class. In this case the land and the chattel real are separate. It may tax one class of persons in one trade in one way, another in another. *Bell's Gap Co.* v. *Pennsylvania*, 134 U. S. 232; *Atchison* v. *Mathews*, 174 U. S. 596; *Florida Central* v. *Reynolds*, 108 U. S. 471. The last case fully sustains this view in a review of the cases. See *Coulter* v. *L. & N. R. Co.*, 25 Sup. Ct.

344. In this case where is the discrimination? All chattels real are taxed alike, and valued alike. No different process of even valuation prevails as to them from other chattels. The act taxes all personal and real property. The state may tax some, exempt others, if not forbidden by its Constitution. *King* v. *Mullin*, 171 U. S. 404. *Home Insurance Company* v. *New York*, 134 U. S. 504, reiterates the great powers of a state in taxation. But this act taxes all persons, all property alike. This illustration is put by counsel. A owns tracts B and C, coal land of equal value, each two hundred and fifty thousand dollars. One is leased, the lease worth $125,000.00. Counsel says that both must be assessed equally, and he assumes that the owner must be assessed $250,000.00 on each, and that this includes the leasehold in one tract, and charging the lessee is double. But he assumes that both must be assessed to the fee owner at equal value. Cannot the value to him of the tract encumbered by the lease be lessened so far as its value is lessened by the encumbrance or servitude created by the lease? In oral argument was put the case of a man owning two tracts. One tract he operates himself for coal, the other over the creek is operated by a lessee. If the lessee is charged with his leasehold, on the right to mine coal, and the other on the fee, not on his coal operations, here is discrimination, The answer is that one holds a fee, and his mining is under no separate right; the other, the lessee, has a separate distinct taxable property. This statute does not forbid the subtraction in valuing the estate of the owner in the leasehold tract of the encumbrance of the leasehold, if in fact it lessens the value, nor does it forbid the state, if it chose, taxing the owner mining in the tract which he operates. The state may tax a life estate and the reversion or remainder as regards the amendment. *Billings* v. *Illinois*, 23 Sup. Ct. 272; *Orr* v. *Gilman*, 183 U. S. 278. See *Copper Co.* v. *Scherr*, 50 W. Va. 533.

In this connection I again ask how is there any double taxation to this plaintiff? A single illegal taxation is not double. If the lessee be charged once, how does he pay double. And the lessor owning the fee is not taxed double, and if he were, how can the lessee say that his own pocket is injured. It cannot be said that the amendment

is violated, and for this reason, as also the reason given above, that is, that the leasehold is a separate independent estate.

A statute is presumed to be constitutional. We must be very, very clear that a state law imposing taxes to support the existence of the state is void because repugnant to the Constitution, before holding it void. The Supreme Court of the Nation has always shown a great and commendable reluctance to invalidate such statutes. It has not made the 14th amendment a weapon for assailing state power on a subject in which the state power is as wide as that of taxation to support its own existence. We cannot forget, we cannot be blind to the fact that vast values in coal leases, in which millions and millions of dollars are invested, have in the past contributed nothing to the public treasury. The state claims in this case that the value of leaseholds in minerals in this State rises to the enormous sum of $200,000,000. These coal operations have, in the main, come to us within the last decade, or largely so. In years past, the matter was not of so much consequence. Under the circumstances the legislature has chosen to think that this condition of things called for the new legislation involved in this case. We cannot forget that great agitation and discussion before the people of the state has recently prevailed upon the subject of their taxation. It has been widely asserted that they have not helped to bear the burden resting till then on other shoulders. This long and warm agitation is part of the history of the state. So warm was this agitation that the legislature appointed a special commission to revise the tax laws. New acts were adopted at an extra session in 1904, and in 1905 a new act for assessing taxes was made to cure, as we have right to say, what were regarded as defects and inequality under changed conditions in a growing state. The legislature has plainly expressed its will that these chattels real shall be taxed, and it being within the taxing power of the State, it ill becomes a court to defeat and frustrate the public and legislative will. For these reasons we affirm the decree of the circuit judge.

Affirmed.

CHARLESTON

BENTLY *et al. v.* ASH *et al.*

Submitted January 30, 1906. Decided April 17, 1906.

1. WILLS—*Construction—Devisees.*

H. K. made his will devising his real estate share and share alike to his seven children and relative to his devise to one of them, who had one child living at the date of the will as well as the date of the testator's death, the following provision was made: "But the share that I will and bequeath to my daughter, Emmazetta Bently, late Emmazetta Knight, it is my express will and desire and I hereby give the same to her and her child or children, to be held by them free from the claim or claims of control of her husband, and the same shall be held and enjoyed---the said Emmazetta Bentley and her child or children, as her or their separate estate, and that the said Bently shall not have or exercise any control over the same directly or indirectly, in any manner whatever." Held: That not only the child living at the date of the will and at the time of testator's death, but all children born to E. thereafter, took each in fee equally under the will with E. the mother. (pp. 646, 647, 648.)

Appeal from Circuit Court, Cabell County.

Bill by Lafayette Bently and others against Stephen J. Ash and others. Decree for plaintiffs and defendants appeal.

Modified and Affirmed.

SWITZER & WIATT, for appellants.

WYATT & GRAHAM, for appellees.

MCWHORTER, PRESIDENT:

Henry Knight of Cabell County made his will devising his real estate to his seven children share and share alike as near in quantity and value as the same could be divided; and as to his daughter Emmazetta, wife of William Bently, he made the following provision: "But the share that I will and bequeath to my daughter, Emmazetta Bently, late Emmazetta Knight, it is my express will and desire and I hereby give the same to her and her child or children, to be held by them free from the claim or claims of control of her said husband, and the same shall be held and enjoyed—the said Emmazetta Bently and her child or children, as her or their separate estate, and that the said Bently shall not have or exercise any

control over the same directly or indirectly, in any manner whatever."

A partition of the real estate was had and 114 acres of said land set apart to Emmazetta Bently as her one-seventh of the real estate, and on the 1st day of August, 1877, John B. Laidley, special commissioner appointed for that purpose in the partition suit, executed to said Emmazetta Bently (nee Knight) a deed for the parcel of 114 acres of land so set apart to her. She entered into possession of said land after the conveyance to her by said special commissioner and she and her husband, William H. Bently, conveyed said land in small tracts to various parties.

On the 20th day of May, 1903, Lafayette Bently, Della McDermitt (nee Bently), Wilson Bently, William H. Bently, Albert Bently, Sarah M. Bently, Maggie Bently, Bonnie Lee Bently, Margarette Bently and Billie Barlow Bently, infants who sued by their next friend William H. Bently, sued out their subpoena in chancery against Stephen J. Ash, W. J. Robinson, James W. Floyd, Wilson Floyd, J. D. Ash, William H. Harvey and William Clark, the holders of the several parcels of land under the conveyances so made by said Emmazetta Bently and W. H. Bently her husband, and at the June rules, 1903, filed their bill of complaint against said parties named as defendants: alleging the making of the will by said Henry Knight, and the fact of the partition of the real estate left by him and the setting apart of 114 acres thereof to Emmazetta Bently and the conveyance by her and her husband, W. H. Bently, of the said 114 acres in small parcels to various parties; alleging that the land set apart to said Emmazetta Bently, the mother of all the plaintiffs except W. H. Bently her husband, was their land except one-eleventh, claiming the same under said will, that their mother was entitled to one-eleventh and the plaintiff W. H. Bently the husband of Emmazetta and the father of the other plaintiffs was the legal heir of the deceased child Naoma Bently; praying a construction of the will and that they might be declared the rightful devisees under the will of their proportionate part, and that the deeds mentioned in the bill purporting to convey the land set apart to Emmazetta and the plaintiffs might be cancelled and held for naught so far as the same affected the interests of the plaintiffs, that the

cause be referred to a commissioner to ascertain the value of rents, issues and profits of said various tracts for the last five years and that their proportionate share thereof be decreed to them, and for general relief.

On July 25, 1903, the defendants all having been served with process and failing to appear, answer or plead to said bill, the same was taken for confessed as to all the defendants and being submitted to the court the court ascertained that the plaintiffs, the children of Emmazetta Bently, were equal devisees with their mother under the will of Henry Knight and that each was entitled to one-eleventh part of the real estate devised to the mother and held under said will and that the share of Naoma Bently, deceased, descended to her father, W. H. Bently, one of the plaintiffs to this suit; and it was further adjudged, ordered and decreed that the deed from Laidley commissioner to Emmazetta Bently for the 114 acres be set aside and also that all the other deeds mentioned in the bill "purporting to convey in different quantities to different parties the said 114 acres of land should be cancelled, set aside and held for naught so far as the same affects the interest of said children and their rights under the said will of their grandfather said Henry Knight," and proceeded to set aside all the said deeds described in the said bill "so far as the same effects the interests of said children and grand children under the will of said Henry Knight;" and decreed that the interest of Naoma Bently, one of the children who had died, descended to her father as her sole heir who was entitled to that portion devised to her by said will, being an undivided one-eleventh part; "and that each of said children is entitled to an undivided one-eleventh of said 114 acres;" and referred the cause to a commissioner to ascertain whether the said 114 acres was susceptible of partition among the parties entitled thereto and to ascertain further the value of the said 114 acres and the rental value of the various tracts comprising the same and "what would be a fair compensation to each of said nine children and to the said W. H. Bently for the land devised (conveyed) away from said children by their mother and her husband."

The commissioner filed his report ascertaining that Emmazetta Bently took under the will of the estate in fee one-eleventh of the 114 acres; the husband and father W. H.

Bently by inheritance as the heir of two of the deceased children two-elevenths in fee; and the eight living children each one-eleventh; and that the 114 acres as a whole was worth from $800 to $1000 and was incapable of partition into eleven tracts and fixed the rental value of the various tracts which had been conveyed by Emmazetta Bently and her husband; and reported that, "If the contention of the plaintiffs in this matter is correct and sustained, then the husband's 2-11 and the wife's 1-11 of the estate would inure to the benefit of these several vendees, and only 8-11 of the rents, issues and profits should be recovered."

To the commissioner's report plaintiff excepted to the effect that the vendees should not take the 2-11 which afterwards came by inheritance to their grantor W. H. Bently, that at the time of the conveyance the grantor Bently had no interest except his contingent curtesy which was all the grantees purchased. And the defendants made the following objection and exception to the said report: "The defendants object and except to that part of the foregoing report which finds that the plaintiffs or either of them have any interest whatever in and to the tract of land of 114 acres in controversy in this suit.—That the finding of the Commissioner in that regard is wholly contrary to the law and the evidence, and the defendants have a good and complete title in fee simple to the several parcels of land purchased by each of them respectively as set out in the papers in said cause. This December 10th, 1903."

On January 9, 1904, the cause came on again to be heard upon the motion of the defendants to set aside the decree rendered in the cause on the 25th day of July, 1903, which motion was argued by counsel for plaintiffs and defendants and the motion was overruled by the court and the cause was heard upon the report of the commissioner made in pursuance of said decree and upon the exceptions to the same filed by the plaintiffs and the defendants. An exception made to said report which quoted from the will certain language, the court ascertained that the quotation from said will by the commissioner was that in reference to the disposition of the personal property and not of the real property and therefore sustained the exception and overruled the other exceptions of the plaintiffs and the defendants and confirmed and approved

the report after correcting the same by sustaining the said exception of plaintiffs. "The Court doth therefore adjudge, order and decree, that according to the proper construction of the last will and testament of Henry Knight, deceased, the tract of one hundred and fourteen acres of land conveyed by J. B. Laidley, Commissioner, to said Emmazetta Bently by deed bearing date the first day of August, 1877, and described as follows:" (describing by metes and bounds of two tracts of land, one containing 78 acres and the other 36 acres) "being together one hundred and fourteen acres is owned by the assignees of Emmazetta Bently and W. H. Bently, her husband, and Lafayette Bently, Della McDermitt (nee Bently) Wilson Bently, Albert Bently, Sarah M. Bently, Bonnie Lee Bently, Margarette Bently, and Billie Barlow Bently, children of said Emmazetta Bently and W. H. Bently as follows: The assignees of the said Emmazetta Bently owning one undivided one-eleventh of said one hundred and fourteen acres, and the assignees of the said W. H. Bently owning one undivided one-eleventh of said one hundred and fourteen acres; and Lafayette Bently, owning one undivided one-eleventh of said one hundred and fourteen acres, and the other children, namely Della McDermitt (nee Bently) Wilson Bently, Albert Bently, Sarah M. Bently, Bonnie Lee Bently, Margarette Bently, and Billie Barlow Bently, each an undivided one-eleventh thereof, and that said one hundred and fourteen acres should be divided among them accordingly;" and it appearing from said report that the land was not susceptible of partition among the several owners the court decreed the sale thereof and gave judgment in favor of the children of Emmazetta Bently against the defendants for the several sums ascertained to be due from them respectively for their proportion of the rents, issues and profits of the several parcels held by them due to the said children and for costs of the suit. From which decree the defendants Stephen J. Ash, W. J. Robinson, James W. Floyd, Wilson Floyd, W. H. Harvey and William Clark appealed assigning as error the construction of the will giving to the children of Emmazetta Bently, who were born after the death of the said Henry Knight, their interest in the lands in controversy and in finding that the plaintiff, Lafayette Bently, had any interest or title to any part of said lands; that the court erred in re-

fusing to set aside the decree by default of July 25, 1903, and in referring the matter to a commissioner to ascertain the value of the 114 acres and whether the same was susceptible of partition among the parties; and in overruling defendant's exception to the commissioner's report and finding that the plaintiffs or any of them had any interest in the tract of 114 acres of land; and in decreeing a sale of the said land and the distribution of the proceeds thereof as the court might thereafter direct; and in rendering a judgment against the defendants for rents on the several parcels of land conveyed out of the said 114 acres.

The appellants failed to make any appearance by demurrer, answer, plea or otherwise other than to except to the commissioner's report and to make a verbal motion to set aside the decree of July 25, 1903 entered by default, nor have they filed a brief in the cause.

The main question for decision in this cause is the construction of the will, in one view of the case the defendants took nothing by their conveyances from Emmazetta Bently and her husband, W. H. Bently, except the one undivided eleventh in said land held by Emmazetta under the will of her father Henry Knight, and the two undivided elevenths held therein by the grantor W. H. Bently who inherited the same as sole heir at law from the two deceased children of the said Emmazetta and himself, and if this construction is right it renders other questions that might be raised on the record immaterial. What was the intention of the testator Henry Knight in his devise to Emmazetta and her child or children? In *Finley* v. *King*, 3 Pet. 346, Chief Justice Marshall said: "The intent of the testator is the cardinal rule in the construction of wills, and, if that intent can be clearly conceived and is not contrary to some positive rule of law, it must prevail." Page on Wills, sec. 461, says: "The purpose of the court in construing a will is solely to ascertain the intention of the testator as the same appears from a full and complete consideration of the entire will."—Citing *Phayei* v. *Kennedy*, 169 Ill. 360; *Allen* v. *White*, 97 Mass. 504; *Stevenson* v. *Evans*, 10 O. S. 307; *Christy* v. *Christy*, 162 Pa. St. 485. "Intention is the life of a will, and when clear, and violates no rule of law, it must govern with absolute sway."—*McCamant* v. *Nuckolls*, 85 Va. 331; *Cresap* v. *Cresap*, 34 W. Va. 310.

The will bears date and was executed on the 25th day of March, 1875, and probated on the 20th day of the May following. At the date of the will Emmazetta had a child some five months of age, the testator knew of the existence of the child and was well aware of the probabilities of the birth of other children to the said Emmazetta and so expressed in his will clearly the intention of providing for any and all other children that might thereafter be born to his daughter Emmazetta to come in and participate in the provisions of his will. He says, "it is my express will and desire and I hereby give the same to her and her child or children;" that is, "to her and her child" in case she should have no other children but if there should be others born to her then to be held "by her and her children." The words "or children" were clearly added for the sole reason that the probabilities were that others would be born, and that they might take under the will with the one already in existence; then further on in the same sentence says, "and the same shall be held and enjoyed—the said Emmazetta Bently and her child or children, as her or their separate estate." That the testator intended that the child already born should take under the will is clear and there is no reason why he should provide for that one alone, when the probabilities were there would be others bearing the same relationship to him, and, to make it clear that such afterborn children should not be excluded, he added the words "or children." There can hardly be a question but that the testator intended to devise the land to his daughter Emmazetta and her then living child and to such other children as might thereafter be born to her; if he had intended to include only the child then living he would not have added the words "or children." He intended that each child should hold an interest in said land as his own "separate estate." In *Martin v. Martin*, 52 W. Va. 381, at page 393, it is said by JUDGE POFFENBARGER, speaking for the Court: "It is established that under a devise to a person and his children, he having no children at the time of the devise, neither a joint tenancy or tenancy in common between the parent and after-born children is created, unless by some other part of the will it appears that the testator so intended. But, if the devisee has a child at the time of the devise, such child will take an equal share with the parent. In such case the estate will open and

let in after-born children."—Citing *Hatterly* v. *Jackson*, 2 Str. 1172; *Moore* v. *Leach*, 59 N. C. 88; *Gay* v. *Baker*, 58 *Id.* 344; *Hunt* v. *Satterwaite*, 85 *Id.* 73; *Hampton* v. *Wheeler*, 90 *Id.* 222.

In the construction of a will every word it contains is to have its effect provided effect can be given it, not inconsistent with the general intent of the whole when taken together, and no word is to be rejected unless there cannot be a rational construction of the will with the word as it is found. *Graham* v. *Graham*, 23 W. Va. 36; *Ernst* v. *Foster*, 58 Kan. 438. Under the will of Henry Knight his daughter Emmazetta and her children each took in fee equal parts or undivided interests in the land devised and the vendees of Emmazetta and her husband took only the three undivided eleventh parts which their vendors were competent to convey, and this is given to them by the report of the commissioner which report in that respect is confirmed and approved by the decree, but evidently by inadvertence the decree departs from the report in this respect and gives to the plaintiffs all except two-elevenths, one held by Emmazetta and one held by the husband and vendor W. H. Bently as heir at law of one of his deceased children, when he in fact held two shares, there being two deceased children as reported by the commissioner and which was confirmed.

In this regard the decree will have to be modified so as to give to the appellants respectively three undivided eleventh interests in the several tracts claimed by them instead of two undivided elevenths as provided in the decree of January 9, 1904; and as so modified, the same will be affirmed with costs to the appellants as the parties substantially prevailing, and the cause is remanded for further proceedings to be had therein.

Modified and Affirmed.

CHARLESTON

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SCHWARZCHILD & SULZBERGER CO. v. CHESAPEAKE & OHIO RAILWAY CO.

Submitted February 15, 1906. Decided April 17, 1906.

1. WRIT OF ERROR—*Record—Bill of Exceptions.*

When upon the hearing of a case in the appellate court one of the parties tenders and asks to file in the case as a part of the record thereof a paper purporting to be the original bill of exceptions taken in the case on the trial, and it is admitted in open court by the opposing party that it is the paper it purports to be, the court will consider it as a part of the record, in the same manner as if brought up on certiorari. (p. 650.)

2. SAME—*Dismissal.*

Upon a motion in the appellate court to dismiss a writ of error as improvidently awarded upon the ground that "there is, and was, no legal bill of exceptions signed and sealed by the trial judge in said cause," the writ of error will not be dismissed for such reason, where the bill of exceptions as it appears in the record as certified is sufficient on its face. (p. 650.)

3. EXCEPTIONS—BILL OF—*Incorporating Evidence—Skeleton Bill.*

A case in which the bill of exceptions as signed by the judge did not make the evidence taken at the trial a part of the record. (p. 652.)

Error to Circuit Court, Greenbrier County.

Action by the Schwarzchild & Sulzberger Company against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, defendant brings error.

Affirmed.

SIMMS & ENSLOW, for plaintiff in error.

HENRY GILMER and T. N. READ, for defendant in error.

MCWHORTER, PRESIDENT:

Schwarzchild & Sulzberger Company, a corporation, brought its action in the circuit court of Greenbrier county in trespass on the case against the Chesapeake and Ohio Railway Company for damages sustained by the plaintiff because of the failure of the defendant to promptly furnish cars and transport certain cattle shipped by plaintiff from Fort Springs, West Virginia, to Jersey City, New Jersey, in September and October, 1903. The defendant appeared and demurred to the

declrration and each count, which demurrer was overruled: defendant then entered a plea of not guilty; the issue was tried before a jury which returned a verdict in favor of the plaintiff and assessed its damages at $1840.

The defendant moved to set aside the verdict of the jury and grant a new trial because the verdict was contrary to the law and the evidence in the case, which motion was overruled, to which ruling of the court defendant excepted. The court rendered judgment for said damages so assessed and the costs of the suit. The defendant tendered its bill of exceptions which was signed, sealed and made a part of the record. The defendant procurred from this Court a writ of error and *supersedeas* to said judgment. The plaintiff gave notice to the defendant that it would move this Court to dismiss the writ of error and *supersedeas* as improvidently awarded "because there is, and was, no legal Bill of Exceptions signed and sealed by the trial judge in said cause." When the case was called for hearing the defendant in error moved to dismiss the writ of error upon the notice given, and the plaintiff in error moved to quash the notice and writ and moved to dismiss said motion. The defendant in error then tendered and asked to file as part of the record in the case the original bill of exceptions. The plaintiff in error admitted in open Court that the paper presented was the original bill of exceptions taken by it in the court below, but objected to the filing of it, when the case was fully heard upon said motion and upon the transcript of the record of the judgment and submitted.

The record does not disclose any reason given in support of the demurrer to the declaration, neither is it contended for in the brief of counsel for the plaintiff in error, and an examination of the declaration does not disclose any serious defects in it. The demurrer was properly overruled.

The assignments of error as set out in the petition for writ of error which relate to the giving of instructions for plaintiff and complained of, which instructions were based upon the evidence given in the case; and another assignment where it is contended that the court erred in refusing to set aside the verdict and grant the defendant a new trial because the evidence clearly showed that the verdict was wrong. The bill of exceptions as it appears in the record is sufficient to

bring up all the questions upon the exceptions made by the defendant below, and therefore the appeal cannot be dismissed as improvidently awarded. The original bill of exceptions, as it was signed by the judge of the court below and which was admitted in open court to be the original bill, is as follows:

"Schwarzchild & Sulzberger Co.
vs.) T O C.
The Chesapeake and Ohio Railway Company
a Corporation.

Be it remembered that on the trial of this case after F. M. Arbuckle had been duly sworn to report the testimony in shorthand to be taken herein, the plaintiff to maintain the issue on its part joined introduced before the jury the following evidence:

(Here insert stenographer's report)

and rested.

And the defendant to maintain the issue on its part joined, introduced before the jury the following evidence:

(Here insert stenographer's report)

and rested.

And thereupon the plaintiff in rebuttal introduced the following evidence:

(Here insert stenographer's report)

and rested. And the above was all the evidence introduced before the jury on behalf of the plaintiff and of the defendant.

And thereupon the plaintiff asked the Court to give to the jury Instructions marked Numbers 1, 2, 3, 4, and 5 to the giving of which and each of them the defendant objected, which objection the Court overruled and gave to the jury instructions Marked Plaintiff's instructions Numbers 1, 2, 3, 4, and 5 asked for by the plaintiff, to which ruling of the Court in giving said instructions and each of them the defendant excepted.

And thereupon the defendant asked the Court to give to the Jury its instructions marked Defendant's instructions Numbers 1, 2, and 3, which the Court gave and after argument of counsel the jury retired to its room to consider its verdict and after while came into court with a verdict in the words and figures following; towit:

(Here insert verdict of the jury)

The defendant moved the Court to set the said verdict aside, because the said verdict is contrary to the law and the evidence:

The Court overruled the defendant's motion to set the verdict of the jury aside, to which ruling of the Court, the defendant again excepted and asked the Court that this its bill of exceptions to the various rulings of the Court and each one thereof as set out above, be saved to it and this its bill of exceptions be signed, sealed and made a part of the record which is accordingly done.

J. M. McWhorter (Seal)."

There is nothing shown from this skeleton bill of exceptions that at the time it was signed by the judge he had before him the evidence as taken by the stenographer. It also appears that the evidence taken in the case was not incorporated into the body of the bill nor annexed to it or so marked by letter, number or other means of identification, or so described in the bill as to leave no doubt when found in the record that it was the evidence taken in the case, and it does not appear from the record as it is printed that the evidence was certified by the stenographer. It has been held in several cases by this Court in the last few months that such skeleton bill of exceptions as that herein set forth is insufficient to bring up the evidence.

While the said bill of exceptions was sufficient as far as the instructions were concerned having designated them in the bill as marked by numbers, but as it is impossible to pass upon the correctness of the instructions asked for without having the evidence in review and the evidence not being before the Court the appellate court will not presume that the circuit court erred in giving such instructions. In *Tracey* v. *Carver*, (80 S. E. 825), 57 W. Va. 587 (Syl. pt. 3), it is held: "Evidence taken down and transcribed by a shorthand reporter is not a part of the record, and can only be made so by a proper bill of exceptions." And in *Dudley* v. *Barrett*, recently decided by this Court, but not yet reported, (Syl. pt. 3), it is held: "Where a paper which is to constitute a part of a bill of exceptions is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, number or other means of identification mentioned in the

bill, or so described in the bill, as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions." And also in a recent case here decided of *Coal & Coke Railway Company* v. *Joyce*, the syllabus is entirely applicable to this case, where it is said: "The skeleton bill of exceptions relied on in this case for the purpose of making the evidence a part of it, does not do so, and the evidence is not a part of the record, under the authority of the cases of *Parr* v. *Currence*, 58 W. Va. 523, *Dudley* v. *Barret, et al.*, 58 W. Va. 235, *Tracey's Admrx.* v. *Coal Co.*, 57 W. Va. 587, and *McKendree* v. *Shelton*, 51 W. Va. 516.

For the reasons herein given the judgment complained of is affirmed.

Affirmed.

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CHARLESTON

CHENOWETH v. NATIONAL BUILDING ASSOCIATION.

Submitted February 27, 1906. Decided April 24, 1906.

1. USURY—*Personal Plea.*
   The defense of usury is personal to the debtor. (p. 656.)

2. USURY—*Assumption of Payment.*
   A purchaser of real estate charged with an usurious debt, who assumes to pay such debt in consideration of his purchase, cannot defend against the usury. (p. 656.)

3. NOVATION.
   Novation is the substitution of one debtor by mutual agreement for another, whereby the old debt is extinguished. (p. 657.)

Appeal from Circuit Court, Randolph County.

Action by L. D. & Florida Chenoweth against the National Building Association of Baltimore City. Decree for plaintiffs and the National Building Association appeals.

Reversed. Bill Dismissed.

L. H. KEENAN and FRED O. BLUE, for appellant.

JAMES A. BENT, for appellees.

SANDERS, JUDGE:

On the 14th day of April, 1896, the National Building Association of Baltimore, Md., advanced to Ida B. Nestor the sum of $520.00 on thirteen shares of its capital stock at that time owned by her, and she agreed to pay to the Association, on the 15th of each and every month, as dues, sixty cents for each of said shares, and also all fines and other charges properly chargeable thereto, until the shares matured and became of the par value of $100 each, and to secure the payment of the same she and her husband conveyed to L. H. Keenan, trustee, a lot in the town of Elkins.

On the 15th day of July, 1896, Ida B. Nestor and husband conveyed the said lot, with covenants of general warranty, to L. D. and Florida Chenoweth, and Ida B. Nestor assigned to the Chenoweths her stock in the Association, and at December rules, 1902, of the circuit court of Barbour county, the grantees in the last named deed filed their bill against the Association and L. H. Keenan, trustee, alleging that the contract was usurious, that they had made payments thereon, which, together with a tender made by them, were more than sufficient to pay off the debt. The Association demurred, and also filed its answer to the bill, denying the usury, and the cause was referred to a commissioner to take and state an account between the parties, and to report upon the same in two aspects, the first as claimed by the Association, and the second, treating the loan made by the Association to the plaintiffs as a loan made at six per cent. interest and the several payments made by the plaintiffs thereon under whatever name or designation as partial payments paid upon said loan. The commissioner reported the sums due under each theory of the case, and recommended that the sum reported by him as due when treating the transaction as a loan at six per cent. interest, be accepted as the basis of settlement. The court accepted the recommendation of the commissioners, and at the final hearing entered a decree in accordance therewith, and the Association appeals.

It is not contended that the provision of the contract by which Ida B. Nestor agreed to pay the dues and fines assessed against the stock in accordance with the charter and by-laws of the appellant until said shares should mature, is anything other than a device or scheme adopted for the purpose of

evading the usury laws. Still, for the decision of this case it is entirely unnecessary for us to so decide, neither do we think it necessary to decide the point raised by the appellant that granting the contract usurious at the time it was entered into, it was purged of its usuary by the action taken at a meeting of appellant's stockholders in January, 1901, by which it was determined that under no circumstances should any stockholder be called upon to pay more than one hundred installments upon his stock. It may be well to remark, in passing, however, that the question as to whether or not the manner of payment can be changed after the time of making the contract, so as to make the payments definite and certain, and thereby relieve the contract of the taint of usury, is discussed in *Harper* v. *Building Asso.*, 55 W. Va. 149. There it did not appear that the by-laws copied into the record were those under which the contract was made, they having been amended some time after the making of the contract, and as so amended, exhibited with the answer. The Court, in its opinion in that case, says: "As they are not the by-laws under which the loan was made, we are without evidence of the character of the by-laws under which it was made. On that question, the record is silent, and the only evidence concerning the nature of the premiums is found in the deed of trust and the contract, and the provisions respecting it found there clearly indicate that the premium was a fixed sum to be paid monthly for an indefinite period of time, namely, until the stock should mature."

But the question we have to determine is, whether or not the appellees, as between themselves and the appellant, are in a position to plead the usury, if such there be, in the contract between the appellant and Ida B. Nestor. The deed from the Nestors to the appellees provided that the latter were to assume the payment of the amount granted on the property by the appellant, and a vendor's lien was retained to secure said sum. This was a part of the consideration for the purchase of the property. The appellant contends that Ida B. Nestor, being the original subscriber, and the shares of stock held by her having been transferred to the appellees, that she was a necessary party to the suit, and that the appellees cannot plead usury without her consent appearing in the record, such defense being personal to the debtor. The

case of *Harper* v. *Building Asso.*, *supra*, is relied upon to support this position. In that case the land upon which a deed of trust had been given to secure a debt to the Association was twice conveyed, and Mrs. Lawrence, to whom the loan was originally made, as well as her immediate grantee, Sallie A. Harper, filed their separate answers, averring an assignment of the usury to the plaintiff, and praying the usury be expunged from the debt and decreed to him. This, it was held, undoubtedly gave the plaintiff the right to have the usury eliminated from the debt. The Court said, "By this, Mrs. Lawrence, the original debtor, was benefited, for in the event of a deficiency, she would have been liable to the building association for the balance due." *Stephens* v. *Muir*, 8 Ind. 352, 65 Am. Dec. 764, is authority for the position that the vendee may plead usury, with the consent of the party who made the contract, it being there held: "Usury, it seems, may be set up by the vendee of real estate subject to the usurious mortgage, with consent of the party who made the usurious contract and who was to suffer by it; and if such person be made a party to the action, he may urge usury as a ground of equitable relief to himself."

Ida B. Nestor, with whom the contract by the appellant was originally made, not being a party to this suit, and it nowhere appearing in the record that she consents that the usury be expunged, the question is, have the appellees the independent right to plead usury? They are not parties to the loan, but purchased the premises upon which the deed of trust had been given, and assumed and agreed to pay the debt. By a long line of decisions in Virginia and this State, it is held that the plea of usury is a defense personal to the debtor, and so the purchaser of land subject to a previous lien cannot object that the lien is usurious, but is bound to discharge the lien, as a part of the purchase price of the land. *Spengler* v. *Snapp*, 5 Leigh 478; *Crenshaw's Admr.* v. *Clark*, 5 Leigh 65. "One who purchases land that is under a deed of trust for a usurious debt cannot set up the usury against that debt." *Smith* v. *McMillan*, 45 W. Va. 577; *Lee* v. *Feamster*, 21 W. Va. 108; *Snyder* v. *Construction Co.*, 52 W. Va. 655; *Harper* v. *Building Asso.*, *supra*. Having agreed to pay the debt of the appellant, as it stood, to allow the appellees to take the benefit of the usury would be giving

them the property for a less amount that they agreed to pay. One standing in the relation of purchaser of mortgaged property cannot have the mortgage debt reduced for usury; the plea of usury is personal to those bound upon the borrowing contract." *Enslava* v. *Building Asso.*, 121 Ala. 480.

Ida B. Nestor will be presumed to have waived the usury in the contract, inasmuch as her consent that it be expunged does not appear in the record. "Where land subject to an usurious deed of trust is conveyed to a grantee, who assumes the payment of the debt named therein as a part of the consideration for the conveyance, he cannot set up the usury as a defense to a sale under the deed of trust. He has received a consideration for his undertaking to pay the debt, and will not be permitted to get rid of its payment by relying upon a defense which is personal to the original debtor, and which he has waived." *Dickenson* v. *Loan Co.*, 93 Va. 498. Citing *Michie* v. *Johnson*, 21 Grat. 334; *Christain & Gunn* v. *Worthan*, 78 Va. 100.

It is insisted on behalf of the appellees that inasmuch as they became responsible for the debt of Ida B. Nestor to the appellant, by consent of all the parties, that they thereby became new parties to the contract by novation. There is nothing in the record to show that the appellant released Ida B. Nestor, or that the appellees were recognized by the appellant as liable for the debt, further than after the transfer of the stock an account was opened with them on the books of appellant. "Novation requires the creation of new contractural relations as well as the extinguishment of old. There must be a consent of all the parties to a substitution, resulting in the extinguishment of the old obligation and the creation of a valid new one." *Izzo* v. *Ludington*, 79 N. Y. Supp. 744; *Crosby* v. *Jerolman*, 37 Ind. 264; *Appeal of Shafer*, 99 Pa. 246; *Wallace* v. *Axtell*, 5 Col. App. 432. "The original agreement of which novation is sought must be absolutely extinguished, and the new agreement substituted for it." 16 Am. & Eng. Ency. Law, (1st Ed.), 864. "The agreement of a purchaser of real estate to pay a debt evidence by a promissory note and secured by a mortgage, as a part of the purchase price, even where the payee subsequently agrees to accept the purchaser as the payor and re-

lease the maker, does not constitute a novation." *Kelso* v. *Fleming*, 104 Ind. 180. "A novation is never presumed, but must be established by the full discharge of the original debt by the express terms of the agreement or the acts of the parties, whose intention must be clear." *Henry* v. *Nobert*, (Tenn.), 35 S. W. 444; *McCartney* v. *Kipp*, 171 Pa. 641. So, we cannot say that the facts presented bear out the contention that there was a novation of the contract. And, again the appellees assumed to pay the debt. The payment of this debt was the consideration for the land conveyed to them. What difference to them whether the debt be usurious or not? They must pay the sum agreed to be paid by them for the land.

Holding as we do, it is unnecessary to go into the question as to whether or not the tender claimed to have been made by the appellees is such a tender as is contemplated by law.

The decree of the circuit court is reversed, and the plaintiff's bill dismissed.

Reversed.

CHARLESTON

CLEAVENGER *et al.* v. STURM *et al.*

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Submitted February 27, 1906. Decided April 24, 1906.

1. SPECIFIC PERFORMANCE—*Executory Contract—Fraud.*
   An executory contract for the sale of land will not be specifically enforced in favor of a vendor who has made material fraudulent misrepresentations, upon which the vendee relied in making the contract. (p. 661.)

2. SAME—*Cancellation of Contracts—Fraud.*
   Equity will rescind such contract where such relief is asked by the purchaser. (p. 667.)

3. SAME—*Misrepresentations.*
   Misrepresentations, though in a slight degree, of material facts relied upon by the vendee, will defeat specific performance in favor of the vendor. (p. 667.)

4. SAME.

A court of equity will not specifically enforce an executory contract when it appears to be unfair, tainted with fraud or induced by misrepresentations. (p. 667.)

Appeal from Circuit Court, Barbour County.

Bill by S. A. Cleavenger and others against B. A. Sturm and others. Decree for plaintiff, and defendant Sturm appeals.

Reversed. Contract Rescinded.

DENT & DENT, for appellant.

SAMUEL V. WOODS, for appellees.

SANDERS, JUDGE:

On the 15th day of December, 1902, a contract was entered into between Samuel A. Cleavenger and B. A. Sturm, whereby the former agreed to sell and convey to the latter 122 acres of land, with the exception of the coal underlying same which had been sold, and which was stated to be twenty-seven or twenty-eight acres, lying in Barbour county, for the sum of $8,075. At the time the contract was entered into, Sturm paid $100 on the cash payment. On the 17th day of December following Cleavenger made and tendered Sturm a deed conveying to him the property, which Sturm refused to accept, and at the January rules, 1903, S. A. Cleavenger and Mary Cleavenger, his mother, filed their bill in the circuit court of Barbour county, against Sturm and one Allen Moats, to compel specific execution of the contract, which is as follows:

"Dec. 15, 1902. Article of agreement between S. A. Cleavenger of the first part and B. A. Sturm of the second part *Witnesseth*, for and in consideration of Eight Thousand and Seventy-five Dollars, $8,075.00, the party of the first part agrees to sell and convey the said tract of land that he now owns to the party of the second part under a general warranty except the coal that has been sold, about twenty-seven or eight acres, further money in trust, which is held by the Mother of the party of the first part and in case she does not sign her right away to the party of the second part the party of the second part is to leave in bank what would be considered her third interest in said land and the above tract

contains 122 acres & the 5½ acres of land that the party of the first part has rented of his mother and is to rent it to the party of the second part just as he has it and when it comes into his possession is to convey it to the party of the second part at the same price per acre and the cash payment is to be Twenty Hundred or more at the discretion of the party of the second part and the residue in six and eighteen months at six per cent interest from date of deed. Possession is to begin on or before the 15th day of March, 1903."

After setting up in the bill the agreement, and the fact of making and tendering the deed, and Sturm's refusal to accept same, the plaintiffs claimed that in the negotiations for the purchase of the land Sturm stated that it was a joint purchase for the benefit of himself and Allen Moats, his father-in-law, and further represented that Moats was to sign the notes for the deferred payments, and that his name should have been signed to the contract, and that he would thereafter sign the same. To the bill Sturm and Moats filed their separate answers, the latter denying that he had any connection whatever with the contract, or that he had ever authorized Sturm to represent that he would purchase the land, and further denying that he authorized Sturm to sign his name to any contract for the purchase of the land mentioned, or to any notes which might be given for the purchase price thereof. In the answer filed by Sturm it is claimed that as an inducement for him to enter into the contract, Cleavenger represented that there were at least twenty acres of the Pittsburg seam of coal on said land which had never been sold, and that in addition the land was underlaid with the Freeport seam of coal, and that upon an examination of the deed conveying the coal it would be found that the matter was as stated, when, as found by Sturm on examination, made after the signing of the contract of purchase, there had been conveyed by said deed all of the Pittsburg seam of coal and all of the Freeport seam underlying the Pittsburg seam, and that the deed conveying the coal also contained the following provision: "It is expressly agreed and understood that the parties of the first part further grant unto the party of the second part the right of ingress and egress under, over and through said tract of land for the purpose of exploring, excavating, mining and removing said coal with

all the rights of drainage, air shafts, ventilation, and to go under and through said land for the purpose of removing other coal that may be owned and mined by the said party of the second part, or its successors and assigns from other tracts of land that may be operated and mined by him or them, and the said party of *of* the second part is released from all damage that may accrue to the surface of said land by reason of the removal of the said coal from under the same; and all other usual mining rights and privileges are hereby granted that may be required in the opinion of the party of the second part to carry on said mining operations and remove the coal aforesaid, but it is expressly understood that the right to bore for oil and gas is reserved by the parties of the first part, provided always that it shall not interfere with or cause damage or annoyance to the second party in its coal operations." It is claimed that Cleavenger said nothing in regard to these mining privileges and provisions of the deed when the contract was entered into. Sturm also denied that he had ever represented that Moats was interested in the purchase in question, and prayed for a rescission of the contract, and a decree against Cleavenger for the cash payment.

That the contract for the sale and conveyance was entered into and that Sturm paid $100 cash is not questioned, and inasmuch as the court below decreed only against Sturm, and not against Moats, and there being no cross-assignment of error, the contention that Moats was interested in the purchase is eliminated from the case.

The specific performance of the contract is resisted, and the recission thereof asked, on the ground that the plaintiff, Samuel A. Cleavenger, made certain misrepresentations, whereby the defendant Sturm was induced to sign the contract of purchase: It is charged that he represented to the defendant that there remained unsold upon the tract of land twenty or twenty-five acres of the Pittsburg vein of coal, and that the entire tract of land was underlaid with the Freeport vein of coal, none of which had been sold, and also that by the terms of the contract it was represented that in making the sale of the forty acres of coal underlying the land, only such mining rights and privileges were given as were necessarily implied by the grant, when, as a matter of

fact, all of the Pittsburg coal, and forty acres of the Freeport vein, had been sold and conveyed, and the mining rights and privileges granted by the deed conveying the forty acres of coal were greater than those which necessarily, by implication, would have followed the grant.

It appears that Cleavenger, on the 19th day of June, 1899, conveyed to James Irwin all the coal underlying forty acres of this tract of land, while the contract sought to be enforced represents that the coal had been sold under about twenty-seven or twenty-eight acres thereof. There is no representation by the terms of the contract as to the Pittsburg vein of coal, and the representations relied upon as to this coal are verbal statements claimed to have been made by Cleavenger before the contract of purchase was signed. The evidence as to what Cleavenger said in this regard is very conflicting and uncertain, but assuming that it shows what the defendant claims it does, still it would be insufficient to defeat specific performance, much less ground for rescission. These representations were matters of opinion. It is clear, from the evidence, that Cleavenger did not know, as a matter of fact, that there were twenty or twenty-five acres of the Pittsburg coal which had not been sold. He took Sturm upon this tract of land, showed him the outcrop of the coal, and pointed out the boundaries of the coal which had been sold. Sturm's opportunities for knowing whether or not twenty or twenty-five acres of the Pittsburg vein of coal remained unsold were as good as those of Cleavenger. He had the same information Cleavenger had, and was bound to know at the time of these statements that Cleavenger was giving them purely as a matter of opinion. "Where the representation *consists* of general commendations, or mere expressions of opinion, hope, expectation, and the like, and where it relates to matters which, from their nature, situation, or time, cannot be supposed to be within the knowledge or under the power of the party making the statement, the party to whom it is made is not justified in relying upon it and assuming it to be true; he is bound to make inquiry and examination for himself so as to ascertain the truth; and in the absence of evidence, it will be presumed that he has done so, and acted upon the result of his own inquiry and examination." Pom.

Eq. Jur., (3 Ed.), section 891. This being so, the defendant cannot be relieved from the contract upon this ground.

But the representations as to the Freeport vein of coal are different. The contract itself represents that the coal under about twenty-seven or twenty-eight acres of this tract of land had been sold, when, as a matter of fact, the plaintiff had sold and conveyed to Irwin, forty acres, making a difference of twelve or thirteen acres. This provision of the contract is a representation upon the part of Cleavenger that only twenty-seven or twenty-eight acres of this coal had been sold, which, at the time, he knew was untrue, because of his previous conveyance to Irwin. Having by the terms of his contract made this representation, which at the time he knew to be untrue, he cannot now be heard in a court of equity to demand specific performance of that contract, if these representations were material, and relied upon by the defendant, and he induced thereby to sign the contract. The evidence as to whether or not Cleavenger represented that his entire tract of land was underlaid with the Freeport vein of coal is somewhat conflicting, but the evidence that such representation was made clearly preponderates. The verbal testimony showing that Cleavenger represented that none of the Freeport vein of coal under this tract of land had been sold is sufficiently combatted by the terms of the contract itself, and by the statements which Cleavenger made, that he supposed that the deed conveyed all of the coal under the land which had been sold. But it appears that the entire tract is underlaid with the Freeport vein, and this being so, it is immaterial as to whether or not Cleavenger made verbal statements or representations as to this fact, because by the terms of his contract he sold to Sturm all the coal underlying the land, except as to the twenty-seven or twenty-eight acres which had been sold, when, as a matter of fact, the entire tract is underlaid with coal, and he having sold and conveyed forty acres instead of twenty-eight acres, which at the time of making the contract with Sturm he knew, and knowing, represented otherwise, would be a fraudulent misrepresentation. Furthermore, the provision of the contract reciting that twenty-seven or twenty-eight acres of coal had been conveyed, without referring to the mining rights and privileges contained in the deed of conveyance was a representation that

only such mining rights were granted by implication as were necessary for the removal of the coal. The defendant had the right to assume that this was so, and if at the time of the contract the plaintiff knew that he had conveyed away this property, and that in the deed of conveyance he had granted mining rights and privileges which did not impliedly follow the grant, it was his duty to make such facts known. The mining privileges which were granted in the deed to Irwin for the forty acres of coal are broad, and authorize the doing of many things which would not have been authorized and which could not have been done under a deed granting only the coal, with the necessary mining rights and privileges. A court of equity, where a false representation has been made as to a material matter, which has been relied upon by the purchaser, and he thereby induced to purchase, will not enforce specifically the contract, but will rescind it, if asked to do so. "A false representation of quantity of land, not relied on by the purchaser, and not operating to induce him to purchase, will give him no relief for deficiency; but when such false representation is proven, presumably it does so operate, unless it otherwise appear." *Cork* v. *Cook*, 56 W. Va. 51.

It is claimed, however, that Cleavenger invited Sturm to examine the record. It is shown that Sturm did not do so, but relied upon the representations of Cleavenger, which he had the right to do. It is true he could have examined the record, and ascertained the facts for himself, but not having done so, and relied upon the statements of his vendor, the latter cannot complain that he did not examine the record, but is bound by the representations which he made. JUDGE BRANNON, delivering the opinion of the Court in *Cork* v. *Cook*, *supra*, says: "I will not assert that if the complaining party simply have equal means to ascertain, he must make inquiry; but where a representation has been made, especially a known false one, it lies not in the mouth of the maker to say to the other that he should have made inquiry for himself, because he had right to rely on the representation." Kerr on Fraud, 79; *Hull* v. *Fields*, 76 Va. 607; *Wilson* v. *Carpenter*, 91 Va. 183. "It may be laid down as a general proposition that where the statements are of the first kind, and especially where they are concerning matters which, from

their nature or situation, may be assumed to be within the knowledge or under the power of the party making the representation, the party to whom it is made has a right to rely on them, he is justified in relying on them, and in the absence of any knowledge of his own, or of any facts which should arouse suspicion and cast doubt upon the truth of the statements, he is not bound to make inquiries and examination for himself. It does not, under such circumstances, lie in the mouth of the person asserting the fact to object or complain because the other took him at his word; if he claims that the other party was not misled, he is bound to show clearly that such party did know the real facts; the burden is on him of removing the presumption that such party relied and acted upon his statements." Pom. Eq. Jur., (3d Ed.), section 891; *Hull* v. *Fields*, *supra; Linhart* v. *Foreman's Admr.*, 77 Va. 540; *Rorer Iron Co.* v. *Trout*, 83 Va. 397; *Redgrave* v. *Hurd*, L. R. 20 Ch. Div. 1, 13, 14, *et seq.; Gammill* v. *Johnson*, 47 Ark. 335; *Bank of Woodland* v. *Hiatt*, 58 Cal. 234; *Dillman* v. *Nadlehoffer*, 119 Ill. 567. And again the same author says, in section 895: "Where a representation is made of facts which are or may be assumed to be within the knowledge of the party making it, the knowledge of the receiving party concerning the real facts, which shall prevent his relying on and being misled by it, must be clearly and conclusively established by the evidence. The *mere existence of opportunities for examination*, or of sources of information, is not sufficient, even though, by means of these opportunities and sources, in the absence of any representation at all, a constructive notice to the party would be inferred; the doctrine of constructive notice does not apply where there has been such a representation of fact. If one party—a vendor, for example—claims that the invalidating effects of his misrepresentations are obviated, and that the purchaser was not misled by them, either because they were concerning patent defects in the subject matter, or because he was from the outset acquainted with the real facts, or because he had made inquiry, and had thereby ascertained the truth, the foregoing qualification plainly applies; it is plainly incumbent on the vendor to prove the alleged knowledge of the purchaser by clear and positive evidence, and not to leave it a matter of mere inference or implication; *an*

opportunity or means of obtaining the knowledge is not enough.

We must not confound the principles which are to be applied where there is fraud or misrepresentation with those applicable to that class of cases where there is no fraud or misrepresentation, but where the vendor is unable to perform his contract in its entirety, because of a deficiency in the quantity or quality of the estate, or because of defect in his title or interest. In such cases equity may decree specific performance, with compensation or abatement for the deficiency or defect, if the vendor can substantially perform his contract. *Newman* v. *Kay*, 57 W. Va. 98; *Thompson* v. *Jackson*, 3 Rand. 504; 13 Ves. 73; Pomeroy's Eq. Jur., (Remedies), section 831.

Where, however, there is fraud or a misrepresentation which is material, and upon which the defendant relies in entering into the contract, a court of equity will not enforce the contract, but will rescind it. *Oil Co.* v. *Oil Co.*, 47 W. Va. 84; *Thompson* v. *Tod*, 1 Peters (U. S. C. C.), 388; *Boynton* v. *Hazelboom*, 96 Mass. 107; *Miller* v. *Chetwood et al.*, 2 N. J. Ch. 199. "An executory contract for the sale of land will not be specifically enforced where the written memorial describes the tract as containing 130 acres, when in fact it contained but 105 acres—the deficiency being supplied by the vendor by a subsequent purchase of 27 acres adjoining, but not within the boundaries of the tract as sold. The law will not compel a vendee either to pay for land he did not buy, or to accept a conveyance of 105 acres when he bought 130 acres." *Snedaker* v. *Moore*, 63 Ky. 542. Pomeroy, in his work on Equity Jurisprudence, classifies fraudulent misrepresentations under six different heads. The first is where a party makes a statement which is untrue, and has at the time an actual positive knowledge of its untruth, and the necessary resulting intent to deceive—the *scienter* at law. This is treated, in some respects, as the highest form of fraud, and is the classification which applies to the facts of this case. Here the representations, by the terms of the contract, were that only twenty-seven or twenty-eight acres of the coal had been sold, whereas, in truth and in fact, forty acres had been sold and conveyed. This is a positive statement upon the part of the vendor, which at the time he knew

to be untrue, having previously conveyed the same away. Also, by the terms of the contract, only the mining rights and privileges such as by law are incidental to and follow the grant of the coal are represented to have passed by the deed, whereas additional privileges were conveyed thereby. To call for specific performance, "The contract must be free from any fraud, misrepresentation even though not fraudulent, mistake or illegality." Pom. Eq. Jur., section 1405.

To entitle one to specific performance it must appear that he who seeks such relief, as a condition precedent thereto, has done or offered to do, and is ready, able and willing to do and perform all the material and essential acts required of him by the stipulations of his agreement, and unless he shows his willingness and ability to fulfil the contract upon his part, a court of equity will not require the other party to perform. Here it appears that Cleavenger is unable to perform the contract. Having conveyed away forty acres of coal, while his contract represented that he had conveyed only twenty-seven or twenty-eight acres, and also having conveyed certain mining privileges not implied by the grant, and it not being within his power to perform, equity and good conscience will not require of the defendant a performance on his part. "The maxim 'he who seeks equity must do equity' is uniformly applicable in actions for specific performance. This rule, it has been said, requires of the plaintiff that he do all that is in his power to fulfill his part of the contract which he is seeking to enforce; according to its terms. He must do his full duty or the court will not regard his prayer." 26 Am. & Eng. Ency. Law (2d Ed.), 44; *Boone* v. *Missouri Iron Co.*, 17 How., (U. S.) 340; *Colson* v. *Thompson*, 2 Wheat., (U. S.) 336; *Morgan* v. *Morgan*, 2 Wheat. (U. S.) 290; *Harvie* v. *Banks*, 1 Rand. 408; *Cohn* v. *Mitchell*, 115 Ill. 124; *Wiengaertner* v. *Pabst*, 115 Ill. 412.

However, the representations made must have been relied upon by the purchaser, and in concluding whether or not this is so, we must look to the character of the representations, and to all the facts and circumstances surrounding the case. These representations go to the very substance of the contract, and, from the whole case, we conclude that they were relied upon by Sturm in entering into it.

Then, again, not only must this be so, but the representa-

tions must be material. But where fraudulent misrepresentations are shown to have been made, and where they have been acted upon by the purchaser and he induced thereby to sign the contract, it will be sufficient to refuse performance and to rescind the contract, if the prejudice is only slight. "The court, however, does not inquire with any care into the extent of the prejudice; it is sufficient if the party who has been misled is very slightly prejudiced, if the amount is at all appreciable." Pomeroy's Contracts (Specific Performance) section 227. And the same author says, in section 228: "If a representation, upon which an agreement has been entered into, is not only untrue but fraudulent, or if it contains any element of knowledge or intention, it forms a complete defense to the enforcement of the whole contract. The party who made it will not be allowed, against the objection of the other party, to waive the particular part of the contract to which the false statement relates, or with which it is concerned, and to obtain a specific performance of the remainder. * * * A representation, as we have seen, may prevent the specific enforcement of an agreement by a court of equity, although it was not intentionally false, although the party making it was innocent of any deception, and believed his statement to be true." *Viscount Clermont* v. *Tasburgh*, 1 J. & W. 112. *Cadman* v. *Horner*, 18 Ves., Jr., 9: "Misrepresentation, though in a slight degree, is an objection to specific performance."

Pomeroy's Eq. Jur., section 898, in treating of the materiality of the representation, says: "If any pecuniary loss is shown to have resulted, the court will not inquire into the extent of the injury; it is sufficient if the party misled has been very slightly prejudiced, if the amount is at all appreciable." *Smith* v. *Kay*, 7 H. L. Cas. 750.

For the foregoing reasons, we reverse the decree of the circuit court, rescind the contract, and give decree in favor of Sturm for the cash payment made by him, with interest.

Reversed. Contract Rescinded.

CHARLESTON

CLARK v. BEARD.

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Submitted February 13, 1906. Decided April 24, 1906.

1. TENANCY IN COMMON—*Ouster of Co-Tenant—Payment of Taxes.*

The payment of taxes by one co-tenant, on the land owned in common, does not of itself constitute an ouster of another co-tenant. (p. 674.)

2. SAME—*Adverse Possession—Commencement.*

The statute of limitations does not begin to run in favor of one co-tenant of land in possession, against another co-tenant thereof, until actual ouster by the former, or some other act or acts on his part amounting to a total denial of the right of the latter, and until notice or knowledge of the act or acts relied on as an ouster is brought home to him. (p. 673.)

3. SAME.

The notice or knowledge required must be either actual, or the act or acts relied on as an ouster must be of such an open and notorious character as to be notice of themselves, or reasonably sufficient to put the disseized co-tenant on inquiry which, if diligently pursued, will lead to notice or knowledge in fact. (p. 675.)

4. EJECTMENT—*Verdict—Form.*

If the evidence on the trial of an action of ejectment shows that the plaintiff is entitled to hold a part, share or interest (less than the whole) of or in the land sued for, and that the defendant is entitled to hold a part, share or interest (less than the whole) of or in said land, the verdict should specify and describe the part, share or interest which each of the parties is entitled to hold. (p. 676.)

Error to Circuit Court, Pocahontas County.

Action by Preston S. Clark against Emma C. Beard. Judgment for defendant, and plaintiff brings error.

Reversed. Remanded.

ANDREW PRICE, L. M. MCCLINTIC, and HENRY GILMER, for plaintiff in error.

R. S. TURK and F. R. HILL, for defendant in error.

COX, JUDGE:

Sheldon Clark, owning a large quantity of land in Poca-

hontas county, by deed dated the 29th of August, 1868, conveyed a part of his land to his sons Preston and Peter, reserving one-half interest in all the "stone coal" in parcels of the land so conveyed, with certain privileges as to the use thereof. By deed dated the same day, Sheldon Clark conveyed another part of his land to his son Sherman; and it is claimed that by this deed he also conveyed to Sherman the one-half interest in the "stone coal" reserved by the deed to Preston and Peter. In 1872, Peter died, and a controversy arose between his widow and his father, Sheldon, as to who was entitled to Peter's interest in the land so conveyed to Preston and Peter. This controversy was settled by the widow conveying whatever interest she had to the father. It is claimed that after this conveyance there was a partition of the land so conveyed to Preston and Peter, between Preston and Sheldon, the owner of the interest formerly held by Peter. Afterwards, Preston conveyed to others certain parts of the land which he claimed had been so partitioned to him. Sherman died in 1901. The third clause of his will is as follows: "I give to my daughter, Emma C. Beard, all my land of all descriptions to have it during her lifetime giving to her the privilege to deed it to her children during her lifetime as she may think best not taking in consideration quantity and quality and if she leaves no will directing how to divide it among her children at her death, I then direct M. L. Beard, if living at her death to divide the land among her children not taking in consideration quantity and quality and his division shall be legal under this will." At September rules, 1904, Preston Clark filed his declaration in this action of ejectment against Emma C. Beard, describing and claiming all the land so conveyed by Sheldon to Preston and Peter Clark, less the part which he claimed had been partitioned to Sheldon and by his will devised to certain persons therein named, and less the parts conveyed by Preston to others. There was a plea of not guilty, a trial by jury, and a general verdict for the defendant in this language: "We the jury find for the defendant." Plaintiff moved to set aside the verdict, which motion was overruled, and judgment entered dismissing the action, and plaintiff excepted. A writ of error was allowed to the judgment, upon petition of the plaintiff.

The plaintiff in error makes three assignments of error, the

first and second of which relate to instructions to the jury, given and refused. These instructions will hereafter be referred to by their numbers.

Complaint is made of the refusal of the court to give No. 1 for plaintiff in error, which is as follows: "The court instructs the jury that the deed of Aug. 29, 1868, from Sheldon Clark to Sherman H. Clark, under which defendant claims, does not grant to said Sherman Clark any interest in the coal in or under the lands described in the plaintiff's declaration." This instruction raises the question of the sufficiency of the deed from Sheldon to Sherman Clark to pass any interest in the coal in the land claimed by the declaration. It is urged that the description in this deed is insufficient to pass to Sherman Clark the one-half interest in the coal reserved by the deed from Sheldon to Preston and Peter Clark. This deed to Sherman after describing and conveying certain land upon the waters of Cherry and Hills Creek north of a designated line, and certain land on Robins Fork of Spring Creek south and east of a designated line, contains the following additional clause: "(the different tracts lying on Spring Creek and Cherry are as follows: 1,000, 100, 45, 230, 392, 206, 72, and the line above given is the division line in said surveys). Also, I convey to said Sherman H. Clark one-half interest in all the stone coal that is upon the different tracts just given, lying on Spring Creek and Cherry, west and north of the division line heretofore given," etc. It is obvious that the words "different tracts" in this clause relate to the tracts last before mentioned. The conveyance of the interest in coal was additional to the grant of the other lands specifically described in the previous part of the deed. We must give to the deed a reasonable construction. The conveyance of land without limitation, reservation, or exception, includes the coal in place under it, if owned by the grantor. There was no necessity for adding a clause conveying an interest in the coal in the land conveyed absolutely by the deed. We think that it was the intention of the additional clause to pass a one-half interest in the coal in the land included in the tracts mentioned, west and north of the designated division line. It is also claimed that, because this clause uses the word "convey" instead of "grant," in relation to the one-half interest in coal, it is insufficient. The word "convey" is sufficient to

pass an estate in land. *Chapman* v. *Charter*, 46 W. Va. 769. There was no error in refusing this instruction.

Complaint is made because instructions Nos. 1, 2, 3 and 4, offered by defendant in error, were given.

The plaintiff in error claims the one-half interest in the coal conveyed by the deed from Sheldon to Sherman Clark, to the extent that the coal is in the land for which he sues, by ouster and adverse possession against his co-tenant, Sherman Clark, and against his devisee or devisees. We will consider Nos. 1 and 3 together. They are as follows:

No. 1. "The court instructs the jury that a tenant in common may oust his co-tenant and hold in severalty, but a silent possession, unaccompanied by any action amounting to an ouster, or giving notice to the co-tenant that his possession is adverse, cannot be construed into an adverse possession."

No. 3. "The court further instructs the jury that the plaintiff, Preston S. Clark, and Sherman H. Clark, deceased, were joint tenants in the coal underlying the lands in the declaration mentioned, and became so by virtue of the conveyance from their father, Sheldon Clark, introduced as evidence in this case; and that in order for the plaintiff, Preston S. Clark, to oust the said Sherman H. Clark or his devisees as to said coal right, there must be an actual ouster by the said Preston S. Clark of his co-tenant, Sherman H. Clark or his devisees, and a giving of notice to his said co-tenant, Sherman H. Clark, or his devisees, that his possession was adverse at least for a period of ten years prior to the institution of this suit, and if the jury believe that there was no such ouster and notice then they must find for the defendant, Emma C. Beard."

The defendant in error had a right to instructions propounding the law covering her theory of the case, based upon the evidence before the jury. In considering the language of these instructions, it is well to keep in view certain principles applicable. Ouster, in a legal sense, is the wrongful dispossession or exclusion from real property of a party entitled to the possession thereof. The statute of limitation does not begin to run in favor of one co-tenant of land in possession, against another co-tenant thereof, until actual ouster by the former, or some other act or acts on his part amounting to a total denial of the right of the latter, and until notice or knowl-

edge of the act or acts relied on as an ouster is brought home to him. *Boggess* v. *Meredith*, 16 W. Va. 1; *Cooey* v. *Porter*, 22 W. Va. 123; *Frye* v. *Payne*, 82 Va. 759; section 15, chapter 90, Code. The notice or knowledge required must be either actual, or the act or acts relied on as an ouster must be of such an open and notorious character as to be notice of themselves, or reasonably sufficient to put the disseized co-tenant on inquiry which, if diligently pursued, will lead to notice or knowledge in fact. *Cooey* v. *Porter*, *supra*. Knowledge is the equivalent of notice. Thus we see that either actual notice, or notice arising from the open and notorious character of acts, may avail. No. 1, asserts a very old principle of law. It was announced by Chief Justice Marshall in the opinion of the Supreme Court of the United States in *McClung* v. *Ross*, 5 Wheat. 116, and, so far as we are aware, its soundness has never since been questioned. This principle was carried into point 3 of the syllabus of our case of *Justice* v. *Lawson*, 46 W. Va. 163. The essence of this principle is that the silent possession of one co-tenant, without either ouster or notice, is not adverse to the other co-tenant. We cannot say that this instruction was inapplicable to the case, in view of the evidence and of the theory advanced by the defendant, and, being correct in principle, there was no error in giving it. No. 3 was evidently intended to apply to this case the principle stated in No. 1. Instead of using the words "ouster or giving of notice," No. 3 used the words "actual ouster" * * "and a giving of notice." The jury might reasonably conclude from the language of No. 3 that the only notice which could avail the plaintiff would be actual notice given by him of an ouster, and that notice or knowledge arising from the charactor of acts, however open and notorious, could not be considered in determining the rights of the parties. No. 3 was in this respect calculated to mislead the jury, and, in the form offered, should have been refused.

We have not deemed it necessary to discuss the question, when and under what circumstances a presumption of disseizin or ouster of one co-tenant by another, after great lapse of time, is warranted, as no such question was presented by the instructions mentioned. On this subject see, *Purcell* v.

Wilson, 4 Grat. 16; *Stonestreet* v. *Doyle*, 75 Va. 379; *Zeller's Lessee* v. *Eckert et al.*, 4 How. (U. S.) 289.

No. 2, for defendant in error in effect instructed the jury that the payment of taxes by one co-tenant does not operate as an ouster of the other co-tenant. The payment of taxes by one co-tenant, on the land owned in common, does not of itself constitute an ouster of the other co-tenant. *Logario et al.* v. *Dozier*, 91 Va. 492. The silent payment of taxes by one co-tenant—that is, payment not under adverse and exclusive claim to the land, and without notice or knowledge of such claim being brought home to the other co-tenant—is perfectly consistent with the co-tenancy. It has been frequently held that a purchase by one co-tenant, at a sale for delinquent taxes, of the land owned in common, enures to the benefit of the other co-tenant. *Cecil* v. *Clark*, 44 W. Va. 569; *Parker* v. *Brast*, 45 W. Va. 399; *Davis* v. *Settte*, 43 W. Va. 17. There was no error in giving this instruction.

No. 4, for defendant in error, is as follows: "The jury is further instructed that if they believe the plaintiff, Preston S. Clark, recognized or admitted any right in Sherman H. Clark, deceased, or his devisees, to the coal underlying the land mentioned in the declaration, within ten years prior to the institution of this suit, then said Preston S. Clark is estopped from now denying said right to said coal." The only recognition or admission claimed in this case was verbal. The proposition announced in this instruction is erroneous, unless it be qualified. If the recognition or admission mentioned in the instruction was made by plaintiff after he had acquired good title to the one-half interest in the coal in controversy, by such ouster and adverse possession, and such notice or knowledge as was necessary for that purpose, then such recognition or admission would be ineffectual to divest the plaintiff of his title and to re-invest it in his former co-tenant or his devisees. Parol disclaimers cannot affect a vested title, in the face of the statute of frauds. *High's Heirs* v. *Pancake*, 42 W. Va. 607; *Wade* v. *McDougal*, 59 W. Va. 113. No. 4 did not, by its terms, purport to limit its effect to a time when plaintiff in error did not have good title. In substance, it directed the jury that the plaintiff in error would be estopped if he made the admission or recognition within ten years before the suit, regardless of whether he then had

good title or not. This instruction, in the language offered, should have been refused.

The third assignment of error is that the court refused to set aside the verdict and award the plaintiff in error a new trial. By the declaration, the plaintiff in error described and claimed certain land absolutely. There was no disclaimer by the defendant in error, but a plea of not guilty, and the general verdict for defendant in error and judgment thereon. The evidence discloses that the only real controversy in the case was in relation to the one-half interest in the coal under the land claimed by the declaration. The plaintiff in error's right and title to the land sued for (other than the one-half interest in the coal) was uncontroverted and unquestioned by the evidence. The plaintiff in error did not locate and identify the land described and claimed in the declaration. This requirement seems to have been tacitly waived by the conduct of the parties in limiting the trial, both by their evidence and instructions, to the controversy in relation to the coal. They seem to have waived all matters of form, and of substance as well, except as to the controversy in relation to the coal. What is the effect of this general verdict for defendant in error and judgment thereon? Are they, if allowed to stand, conclusive between the parties as to all the land for which plaintiff in error sued? Is the verdict sustained by the evidence? The defendant in error should have disclaimed as to all the land for which plaintiff in error sued, except the one-half interest in the coal; but she did not. Under these circumstances, a general verdict for defendant in error and judgment thereon are conclusive between the parties as to the right of possession to all the land sued for, if allowed to stand, unless perhaps the plaintiff in error could in the future show the fact that the controversy in this case was limited to the one-half interest in the coal. The case of *Wilson* v. *Braden*, 48 W. Va. 196, is similar in this respect to this case. There the plaintiff sued for 2,500 acres of land, and the defendant Braden claimed 50 acres and the defendant Deem 250 acres thereof. There was no disclaimer, and no controversy as to the residue of the land. There was a general verdict for defendants. This Court set aside that verdict. In *Low* v. *Settle*, 22 W. Va. 387, the defendant claimed, and the jury found for defendant, a specified

part of the land sued for, and found nothing as to the residue of the land. That verdict also was set aside by this Court. The verdict in the case at bar, for the defendant in error generally, relates to all the land for which the plaintiff in error sued, and in this respect is unwarranted by the evidence, or by any actual claim of the defendant in error in this case. It must be set aside as erroneous. *Wilson* v. *Braden*, *supra*; *Low* v. *Settle*, *supra*; *McArthur* v. *Porter*, 6 Pet. (U. S.) 205; *Reynolds* v. *Cook*, 83 Va. 817; *Slocum* v. *Compton*, 93 Va. 374.

Where the evidence upon the trial of an action of ejectment shows that the plaintiff is entitled to hold a part, share or interest (less than the whole) of or in the land sued for, and that the defendant is entitled to hold a part, share or interest (less than the whole) of or in the said land, the verdict should specify and describe the part, share or interest which each is entitled to hold. *Wilson* v. *Braden*, *supra*; *Callis* v. *Kemp*, 11 Grat. 84; *Gregory* v. *Jackson*, 6 Munf. 25. The statement just made must not be taken as any expression of opinion by this Court that the evidence introduced upon the former trial would justify a verdict in part for plaintiff in error and in part for defendant in error. We express no opinion as to the sufficiency of the evidence to sustain either the plaintiff in error or defendant in error as to the controversy in relation to the one-half interest in the coal.

There has been a mis-trial, and the case must be remanded for another trial. If there shall be no disclaimer, and no waiver of the requirement that the plaintiff in error must locate and show title to the identical land for which he sued, he will not under the law, be relieved from so doing. *Logan* v. *Ward*, 58 W. Va. —; *Wade* v. *McDougal*, *supra*; *Pennington* v. *Underwood*, 59 W. Va. 340; *Stockton* v. *Morris*, 39 W. Va. 432.

The judgment complained of is reversed, the verdict set aside, a new trial awarded, and the case remanded to be further proceeded with according to law.

Reversed. Remanded.

CHARLESTON

YOKUM *v.* STALNAKER, *et al.*

Submitted February 27, 1906. Decided April 24, 1906.

1. APPEAL—*Denial of Continuance—Review.*
   Where it appears, upon consideration of all the facts and circumstances in the cause, that the action of the lower court in denying the motion of a party for a continuance, and in ruling him into a hearing, was plainly erroneous, the appellate court will reverse such action and the decree against him. (p. 679.)

Appeal from Circuit Court, Randolph County.

Bill by Martha D. Yokum and others against Benjamin C. Stalnaker and others. Decree for complainants and defendants Harriet S. Wamsley and others appeal.

Reversed. Remanded.

W. B. MAXWELL and M. PECK, for appellants.

DAILEY & BOWERS, for appellees.

COX, JUDGE:

This cause was decided by this Court upon a former appeal, reported in 56 W. Va. 296. A full statement of the cause, and of another cause heard therewith, may there be found. It is unnecessary to repeat the statement here.

The object of this suit is the partition of a tract of mountain land, said to contain 2,387 acres. This appeal is by Harriet S. Wamsley and Boston Stalnaker, from a decree of the circuit court of Randolph county denying their motion to continue the cause to enable them to produce evidence in support of their exceptions to the commissioner's report of the partition of said land, and overruling said exceptions and confirming the partition as reported. After the case was remanded upon the former decision, the surveyor who acted in the former partition, and two other commissioners, were appointed to make this partition. The three thus appointed reported substantially the same partition as the one set aside by this Court. This partition is peculiar, to say the least. The appellants Wamsley and Stalnaker,

each being entitled to a one-thirteenth of the land, are each by this partition given a strip of land about thirty-seven rods wide and nearly three miles long, as appears from the face of the plat filed.

Appellants complain because their motion to continue the cause, for the purpose of producing evidence in support of their exceptions, was denied. The report of the commissioners was filed on April 10, 1905. The appellants filed their sixteen several exceptions to the report, dated April 12th following. The term of court commenced on that day. The first order of the court which noticed the filing of the exceptions was entered on April 20th. This order recites that the cause was submitted at a former day of the term, upon the commissioner's report, upon the motion of appellants for time to offer evidence in support of their exceptions, and upon their amended answer. The court by this order, without passing upon the exceptions, gave the appellants until April 25th at three o'clock P. M. to offer such evidence. The decree appealed from was entered on April 28th. This decree recites that the appellants had, on April 25th, filed the affidavits of Melville Peck and Boston Stalnaker in support of the motion for a continuance. Some of the grounds of the exceptions are, in effect, as follows: That the commissioners did not lay off the land according to quantity and quality; that the land was laid off in such shape that the shares of appellants are of no value to them; that the plat of partition is not accurate by several hundred acres; that the parcel of land assigned to appellant Wamsley, when correctly platted according to the courses and distances reported, will overlap and include 20 or 30 acres of land outside of the boundary of the tract sought to be partitioned; that the courses and distances of the parcel of land assigned to appellant Stalnaker as reported, when correctly platted, will cut such parcel into two pieces; and that neither of the parcels assigned to the appellants is a full, fair one-thirteenth of the value of the land sought to be partitioned.

In order to make some of these exceptions avail, the appellants must produce evidence to sustain them. *Ransom* v. *High*, 37 W. Va. 838; *Henrie* v. *Johnson*, 28 W. Va. 190. The exceptions named went to the very merits

of the controversy, and involved questions of fact raised for the first time by the commissioner's report. The appellants could not presume in advance that the commissioners would report substantially the old partition. The appellants had a right to file their exceptions to the report and produce evidence to sustain them. The question then is: Were the appellants given a reasonable time, under all the circumstances of the case, to produce their evidence? The report was filed so near the commencement of the term as practically to prevent the taking of evidence before the term. The exceptions were filed promptly. The court on April 20th allowed appellants until April 25th—five days—to take evidence. The five days allowed were during the term of court, when lawyers are supposed to be therein engaged. The subject-matter of the litigation is a large tract of land in the mountains probably some distance from the county seat. The affidavits showed that the time allowed by the court was not sufficient to enable the appellants to produce their evidence, and the reasons why such time was insufficient. If the appellants had a right to except, they had a right to a reasonable time to produce their evidence. It would be useless to give a party the right to except as to a question of fact, and then deny him the right to a reasonable time to produce evidence in support of his exception. Such a course would be equivalent to a denial of the right to except. The evidence of the surveyor acting in this partition was taken at the bar of the court. His evidence disclosed that no survey had been made for this partition. Consequently, to sustain some of the exceptions it would probably be necessary for the appellants to have a survey or plat of the land made. It is the well settled rule that a motion for a continuance is addressed to the sound discretion of the court, under all the circumstances of the case; and that the appellate court will not reverse a judgment or decree because of the action of the lower court on such motion, unless the action was plainly erroneous. *Hanum* v. *Hill*, 52 W. Va. 166; *State* v. *Roberts*, 50 W. Va. 422. This rule in relation to a continuance was never intended to defeat the ends of justice; and it is therefore well established that where it appears, upon consideration of all the facts and circumstances of the case, that the action of the lower court in

denying the motion of a party for a continuance, and in ruling him into a hearing, was plainly erroneous, the appellate court will reverse such action and the decree against him. *Buster* v. *Holland*, 27 W. Va. 510; *Hewitt* v. *Commonwealth*, 17 Grat. 627. The ground for a continuance in this cause was not alone the absence of a witness, and for that reason the rule prevailing on such motion on the ground alone of the absence of a witness does not control. The ground for a continuance here involves practically the right to make defense to the report. To sustain the exceptions would require investigation, and evidence on the part of appellants. No amount of diligence could have forseen the evidence necessary in support of the exceptions, before the report was made. There is no intimation in this record that the motion for a continuance was not in good faith, or was merely for the purpose of delay.

It is urged that a continuance should not have been granted because of the pendency of an injunction against the cutting of timber from the land sought to be partitioned, in a cause brought by one of the appellants. We do not think that the pendency of the injunction was sufficient ground for overruling the motion for a continuance, The court, in the cause in which the injunction was granted, had full power to continue the injunction, dissolve it, or modify it in accordance with the principles of equity.

The rights involved in the cause at bar are of importance to the parties. It appears to us, from all the circumstances, that there was plain error in overruling the appellants' motion for a continuance, and that the time given by the court to produce evidence was unreasonably short. As the motion for a continuance should have been granted, the exceptions to the report should not have been acted upon at the time the decree complained of was entered, and the decree should not have been entered. Our views upon the action of the lower court upon the motion for a continuance make it unnecessary to discuss any other reason advanced for reversing the decree.

For the reasons stated, the decree complained of is reversed, and the cause remanded, to be further proceeded with according to the principles herein announced and the rules governing courts of equity.

Reversed. Remanded.

CHARLESTON

BENNETT v. PRESTON.

59 681
63 496

Submitted March 6, 1906. Decided April 24, 1906.

1. INTOXICATION—*Writ of Possession.*

The execution of a writ of *habere facias possessionem* will be enjoined at the suit of a person in possession of the land to which it relates, who was not a party to the suit in which it was awarded and does not claim title thereto or the right to possession thereof under any party to such action or suit. (p. 682.)

2. SAME—*Decree.*

In such case, the decree perpetuating the injunction will save to the parties the right to litigate all questions of title between them in any other proceeding, they or any of them may see fit to institute. (p. 683.)

Appeal from Circuit Court, Raleigh County.

Bill by L. M. Bennett against A. D. Preston. Decree for defendant, and plaintiff appeals.

Decree reversed and injunction reinstated.

J. W. MCCREERY and W. H. MCGINNIS, for appellant.

J. E. SUMMERFIELD, for appellee.

POFFENBARGER, JUDGE:

L. M. Bennett seeks reversal of a decree of the circuit court of Raleigh county, dissolving an injunction previously awarded him, dismissing his bill and canceling certain deeds under which he claims title to a tract of land, by way of affirmative relief to the defendant, A. D. Preston, pursuant to the prayer of his answer, setting up new matter as ground therefor.

The object of the bill was to prevent the execution of a writ of possession, awarded to Preston, as the purchaser of a tract of land, under a decree of sale in a suit instituted by the state for the sale thereof, as delinquent and forfeited, to which Bennett, who claimed the land and was in possession thereof, was not made a party, and to cancel Preston's deed.

The following are the material facts disclosed by the record: The land was returned as delinquent for non-payment of taxes for the year 1893, as a tract containing 373 acres,

in the names of Jessie M. Myers and Nettie M. Ferguson. It was returned, for the year 1894, as delinquent, in the name of Margaret Ferguson, as a tract of 350 acres, she having acquired the title to it, or an undivided interest in it, by a deed, dated February 5, 1894. For the delinquency of both years, it was sold by the sheriff of the county, on the 4th day of November, 1895, as if it were two separate tracts, R. V. Buckland, J. P. Buckland and G. M. Smith purchasing it, as a 373 acre tract, for the delinquency of 1893, and the state purchasing it, as a tract of 350 acres, for the delinquency of 1894. Buckland and others, having procurred a deed pursuant to their purchase, conveyed three parts of the tract, containing, respectively, 50 acres, 24 acres and 19 acres, to L. M. Bennett, by a deed bearing date May 24, 1898, who then entered upon the land and began cutting the timber. Having been continued on the land books, it was re-sold to the state for delinquency for the years 1895 and 1896. The state then instituted a suit, pursuant to her purchase, for the purpose of causing the land to be sold, and such proceedings were had as resulted in a sale thereof to Preston, in the year 1901, and the awarding of said writ of possession to him, on the confirmation of the sale.

As Bennett was a claimant of the land, he should have been made a party to the suit. The records disclosed his relation to the land, and the statute requires all known claimants to be made parties. Section 6, chapter 105, Code 1899. Being in possession he was entitled to a hearing before being ousted by judicial process. Whether, in such case, a purchaser is entitled to have writ of *habere facias possessionem*, on the confirmation of the sale, we do not decide. If he is, a person in possession, who was not made a party, may enjoin the execution of the writ. *Bushong* v. *Rector*, 32 W. Va. 311.

That the state re-purchased the land for delinquency for years subsequent to the one for delinquency as to which she originally purchased, but before her suit was brought, is immaterial. If any title thereby vested, it went into the state, not Preston. Whether he got any title from the state depends upon the question of right in Bennett to redeem.

Bennett had no right to a cancellation of Preston's deed, because he has not shown title in himself, nor did Preston have any right to cancellation of Bennett's deeds, for he was

not in possession, and had not established any title as against Bennett. To obtain such relief, the plaintiff must ordinarily be in possession and show good title.

In view of these conclusions, the court should have perpetuated the injunction, but without prejudice to the right of any of the parties to take such further proceedings, either at law or in equity, as may be available for the vindication of any rights they may have, and done nothing more.

Therefore, the decree, complained of, will be wholly reversed, annulled and set aside, and a decree entered here, re-instating the injunction, making the same perpetual, without prejudice as aforesaid, dismissing so much of the defendant's answer as seeks affirmative relief and awarding to the appellant his costs in both this Court and the court below; all of which will be certified to said court.

Reversed, and injunction re-instated.

CHARLESTON

59 683
62 590

CASTO *v.* BAKER.

Submitted March 13, 1906. Decided April 24, 1906.

1. DEED—*Construction—Intent of Parties—Evidence.*

In construing a deed in which there is a latent ambiguity as to a boundary line, occasioned by disagreement between monuments and marked lines, on the one hand, and magnetic courses, on the other, therein specified, as matter of description, the intention of the parties, which is the controlling factor in the problem, is to be ascertained from the facts and circumstances attending the execution of the deeds, and the situation and conduct of the parties, and, as a rule of law, they are presumed to have been influenced and controlled by facts of which they had knowledge rather than by things of which they knew not. (p. 687.)

2. APPEAL—*Review—Verdict.*

A verdict, clearly inconsistent with all the controlling facts in the case, none of which are in any way controverted, will be set aside, as being contrary to the law and the evidence. (p. 687.)

Error to Circuit Court, Mason County.

Action by Maria E. Casto and others against C. J. and G. W. Baker. Judgment for plaintiffs, and defendants bring error.

Reversed. Remanded.

W. R. GUNN and B. H. BLAGG, for plaintiffs in error.

JOHN E. BELLER and JOHN W. ENGLISH, for defendants in error.

POFFENBARGER; JUDGE:

On a writ of error to a judgment of the circuit court of Mason county, in an action of ejectment, C. J. Baker and Geo. W. Baker make only one assignment of error, namely, the refusal of the court to grant them a new trial, on the ground that the verdict in favor of the plaintiff, Maria E. Casto, is contrary to the law and the evidence.

Strange as it may seem, there is no conflict whatever in the evidence. The testimony of all the witnesses is in perfect harmony and agreement, and the only question submitted to the jury was that of the intent of the grantor in the execution of three deeds. In the year 1878, Charles Baker, having four sons and a daughter, namely, W. H., J. M., C. J. and Geo. W. Baker, and Maria E. Casto, and owning a considerable quantity of land, divided it among his children, by executing deeds to them for the portions which he desired them to have. Accordingly, A. W. Rollins, a surveyor, came, at his request, and divided the land into parts, by survey, as directed by Charles Baker, and then prepared the deeds, which were immediately executed by Charles Baker and his wife. The lots so laid off for C. J. Baker, Geo. W. Baker and Maria E. Casto, respectively, were coterminous, and a corner, common to the lots surveyed for C. J. and Geo. W. Baker, was in the eastern line of the lot surveyed for Maria E. Casto, the general course of which, though broken, is practically north and south. Where the grantor fixed that line, by the deeds to said three children, is the bone of contention.

As the calls of that line follow the first call in the description of the tract conveyed to Maria E. Casto, as found in her deed, it is necessary, in the interest of clearness, to quote here the description of the first line as well as that of the one

in controversy. They read as follows: "beginning at a stone pile in the run bottom, and thence down the run N. 86 E. about 6 poles, to a poplar near branch, thence N. 3, 43 poles to small white oak corner to G. W. Baker, thence N. 5 E. 17 poles to a dogwood, thence N. 12 E. 6 poles to a small dogwood, thence N. 42 E. 17 poles to a black oak on the brink of the hill." The descriptions in the deeds to C. J. and Geo. W. Baker, so far as they relate to this line and the oak corner, are substantially in accord with the calls just quoted. Geo. W. Baker's deed calls for a large white oak as the corner instead of a small one, but calls for a small one also (on the Maria E. Casto line) four poles from the corner. C. J. Baker's deed makes the call " N. 5 E. 17 poles" read "N. 5 E. 13 poles" and the call "N. 12 E. 6 poles" read "N. 12 E. 6 poles 11 links." These discrepancies are very slight. The location of every monument called for on the line, as described by the deed, is known and uncontroverted, and, if the line be established according to them, the case is for the defendants. But, in attempting to apply the description as a whole, the courses called for do not correspond with those found in running the lines according to the monuments. If the monuments be ignored and the line established by the calls for courses and distances, the case is for the plaintiff. Only part of the line as described in the deed by monuments was actually surveyed and marked. None of the line, claimed by the plaintiff, was actually surveyed. This circumstance is accounted for by the witnesses in the following manner: The line, as actually run, began at the stone pile and ran straight to the G. W. Baker oak corner, and thence, following the calls given in the deed, to the black oak corner, on the brink of the hill. After all the surveying had been done, and before the deeds had been written, Charles Baker asked the surveyor if he could not, without a re-survey, drop down from the stone pile to the poplar, so as to give his daughter more of the top of the hill, between the poplar and the oak, for a building site. He replied that he could, and thereupon wrote the deeds, according to direction. If the calls for monuments are controlling, he changed the line only from the south end of it to the oak corner, and thereby gave her an additional triangle, bounded by lines drawn from the stone pile to the poplar, thence to the oak and thence back to

the stone pile; but, if the calls for courses and distances are to prevail, he moved the whole line to the east about six poles, and thereby gave her an additional irregular parallelogram. Taking the latter view, the jury found for the plaintiff.

The question thus determined by the jury was one of intention, involved in the construction of the deed, a matter of law and fact combined, not one of pure fact. A latent ambiguity in the deed, discovered in the effort to apply it to its subject matter, the land, and not apparent on its face, made it necessary to consider all the circumstances attending the execution of the deed, the situation of the parties and their conduct in the transaction of the business. The object of the departure from the survey, in the execution of the deeds, was to give Mrs. Casto more land near the south end of her eastern line. The problem submitted to the surveyor was, whether he could accomplish that result, without further surveying. To aid him, it was suggested that he make the poplar the south terminus, instead of the stone. All knew where it was. Then his field notes disclosed the oak corner tree on the line surveyed. To that, he could determine the distance by calculation, or insert the distance between it and the stone pile, for it was approximately the same pile. The course of this new line from the poplar to the oak would differ from that of the old line, and the making of that change was probably the most difficult matter in the transaction. For some reason, he failed to make it. If he had made it, all the other courses would have agreed with the line, as indicated by the monuments. He did not know, and could not have known, what object would be the C. J. and Geo. W. Baker corner on the line, in lieu of the oak tree, nor at the northern terminus, instead of the black oak he had marked, if he moved the entire line over. He never went to these points to ascertain what the monuments would be, or to establish any. In point of fact, there was no white oak where the corner would have been and no tree at the end of the line. To have moved the whole line over, without further surveying, it would have been necessary to leave out calls for monuments, or put in calls for imaginary ones. He did neither, but put in those he had marked on the line surveyed. The description of the line, as he wrote it, and the parties all accepted it, under

these circumstances, the grantor to execute the deeds, and the grantees to hold them as muniments of title, call for just such trees at these points as he had marked. They all knew what trees they were and where they stood. None of them, except the surveyor, knew anything about the courses, and he, by inadvertence, failed to discover the discrepancy. He himself could not have discovered it by looking at the deed alone. If it be supposed that he left the courses unchanged, by design, intending to shift the entire line east, it would not follow that the parties knew anything about it, for the reading of the deed would not have disclosed it. It is their intention, not his, that must control, and for which the jury were under a duty to inquire. In seeking their intention, it must be assumed that they were controlled by what they knew, rather than by things of which they had no knowledge, and it is highly improbable that they knew the line, if run according to the courses, would go about six rods east of all the monuments called for except the first one. All three of the deeds called for the white oak corner and two of them for the black oak corner, both of which natural objects were well known to all the parties. Moreover, the motive by which all parties were actuated in effecting this change of the plan of division, was to give Mrs. Casto more land at the south end of the line in question. Nothing was said about increasing the area of her lot at the northern end of it. This is a very potent circumstance. The motive in any series of acts is all-pervading in its silent domination of the actors.

This analysis of the parol evidence illustrates the wisdom and justice of the well settled rule, that marked lines and natural monuments control courses and distances. Its most frequent application is found in cases in which the subject matter of the inquiry is the identification of a boundary line, but the element of intention enters more or less into every such case. Here, it is unusually prominent, for the reason that all the facts and circumstances, relating to the preparation, execution and delivery of the deeds are shown. Ordinarily, they do not so fully appear. The difference between this case and those in which the rule is generally applied, is one of degree, not of principle. The jury, in arriving at their verdict, wholly ignored this rule. They also returned a verdict clearly inconsistent with the overwhelming weight of practi-

cally all the facts disclosed by the evidence, none of which were in dispute. This, of itself, entitled the defendants to a new trial. *Chapman* v. *Liverpool Salt Co.*, 57 W. Va. 395; *Davidson* v. *Railway Co.*, 41 W. Va. 407; *Johnson* v. *Burns*, 39 W. Va. 658.

For the reasons stated, the judgment will be reversed, the verdict set aside, a new trial allowed and the case remanded.

Reversed. Remanded.

CHARLESTON

59 688
65 738

COMER *v.* RITTER LUMBER CO.

Submitted February 20, 1906. Decided April 24, 1906.

1. EVIDENCE—*Motion to Exclude Improper Evidence—Appeal.*
   One who resists a motion made by a party introducing improper evidence to exclude it from the jury cannot complain, on appeal, of its introduction. (p. 689.)

2. PERSONAL INJURY—*Damages—Infant.*
   An infant cannot recover damages for loss of service during minority arising from personal injury. (p. 690,)

Appeal from Circuit Court, McDowell County.

Action by Arthur G. Comer against the Tug River Coal and Coke Company. Judgment for plaintiff and defendant appeals.

Reversed.

J. J. DIVINE and RUCKER, ANDERSON & HUGHES, for plaintiff in error.

E. C. MARSHALL, for defendant in error.

BRANNON, JUDGE:

Arthur G. Comer, a boy between thirteen and fourteen years of age, while in the employ of W. M. Ritter Lumber Company, at a saw mill, was injured by a fragment of the cylinder head of a steam saw mill striking his foot, so injuring three of the toes that a part of his foot had to be amputated. The claim of the plaintiff for recovery is, that the

piston rod which carried the log carriage to and fro, owing to a loose bracket, was in bad condition, which caused it to break and drive out the head of the cylinder, breaking it into fragments, which were scattered around by the force of the steam, one piece striking Comer. It is also alleged that there should have been a barrier to protect the workmen against injury from the blowing out of the cylinder head. Comer by his father and next friend brought an action against the company and recovered $1,200 damages by verdict and judgment, and the company brings the case to this Court.

One question in the case is this. The plaintiff gave evidence over objection to prove that the company had not given instruction to Comer for his safety under the law which requires such instruction in the case of an infant employee. After this evidence was given the plaintiff moved the court to exclude the question and the answer, but the defendant objected to their exclusion. We are of the opinion that this point is untenable. "The appellant must be consistent, and if he asks the court below to make a specific ruling, or to proceed in a certain manner, he cannot complain in an appellate court that the ruling or action is erroneous. He has invited the error and must accept its results, and the appellate court will not reverse a judgment at his instance on account of it." 2 Ency. Pl. & Prac. 519.

Another point is, that several witnesses were allowed to express their opinions to the effect that the operation of that mill or cylinder head, piston rod and bracket was dangerous without protection, meaning some barrier erected to prevent the cylinder head, in case of its blowing out, from flying out and injuring the workmen. The point of this objection is, that this was a subject upon which mere opinion evidence could not be given, but was provable by evidence of facts. In response to this it may be said that the construction and operation of machinery involves technical matters. The witnesses giving this evidence were experienced in the construction and operation of mills, had helped to construct them and operate them, had helped construct this one, and knew much of this mill from personal experience. We think their evidence was admissible. They also stated facts in connection with their opinions touching this mill.

Another point of objection is, that it was incumbent on the plaintiff to prove that the injury was due to the defective condition of the steam feed as a matter of fact, and that the defendant knew or could have known such defect, by reasonable care, and did not provide a safe place for its employees to work in. This is clearly the duty of the plaintiff. He must show negligence in this respect. He must show that the plaintiff's injury proceeded from failure and neglect of duty imposed by law upon the defendant. He must show that the mill machinery was defective and dangerous. Whether he has done so we do not say. That is left for the decision of a jury upon a new trial. Whether the plaintiff was where he should not have been is a question for the jury.

Defendant complains of an instruction given by the court that, "the plaintiff in his action is entitled to recovery, he may recover the value of his time lost during his cure and a fair compensation for his physical and mental suffering caused by the injury, as well as any permanent reduction of his power to earn money." We think this instruction plainly erroneous. It gave the plaintiff recovery of damages from the time of the boy's injury for more than seven years of his minority for loss of service. As appears in *Halliday* v. *Miller*, 29 W. Va. 431, and *Trapnel* v. *Conklyn*, 37 *Id.* 253, the father is entitled to the son's services until his majority. All the books say so. Thompson on Neg., section 7310. 8 Am. & Eng. Enc. L. (2nd Ed.) 651, states that the minor cannot recover as an element of damages for the loss of time during minority. Clearly so, because the father owns the service of the child. Action for loss of service up to majority must be in the name of the father. Counsel for the plaintiff does not deny this legal proposition, but he would meet it by saying that as the father brought this suit as next friend he is estopped from himself bringing another suit to recover damages for loss of service of his son during minority. We think that the Ency. Pl. & Prac., vol. 14, 999, will not sustain this position. True, the case of *Barker* v. *Flint*, 91 Mich. 298, mentioned in the Encyclopedia might seem, only seem, to support that view. It says that when a father sues as next friend for his son, and recovers damages, a suit in his own name to recover for loss of service would be barred. That is plainly so, because he obtains a recovery in

the name of his child, and is estopped from suing in his own name to get a double recovery. That may well be so; but it does not thence follow that because the father is barred that transfers or assigns the right of action to the son. The question is, whether the son can recover for loss of service during his minority. That is our question. We say he cannot recover for want of legal title—for want of right of action. The instruction was erroneous in this matter. We cannot say, as we are asked to say, that the amount of damages recovered would be justified as compensation for damages *after* the boy's majority. The instruction allowed a recovery for all time after the injury, and we cannot guess whether the jury did or did not exclude loss of service during the boy's minority. Indeed, we will presume the jury did not do so, because the instruction would forbid it. We will add that the instruction also allowed damages for the permanent reduction of the boy's power to earn money, when there was no evidence touching that matter, further than the fact of injury. We may say that the loss of one-third of his foot would necessarily diminish the boy's capacity to earn money; but no evidence was given to enable the jury to measure the damages. We do not mean to say that in such case it is possible to give evidence constituting certain data or standard for exact measurement; still it seems that there ought to be some evidence forming a basis for approximate estimate. *Watts* v. *Norfolk & W. R. Co.*, 39 W. Va. 196. Instructions should not be given upon a matter on which there is no evidence, to which the instructions could be applied. *Parker* v. *Bldg. & Loan*, 55 W. Va. 134; *Oliver* v. *Ohio River R. Co.*, 42 *Id.* 703.

It follows that we must reverse the judgment, and set aside the verdict and grant a new trial.

Reversed.

CHARLESTON

TAYLOR v. BRAXTON COUNTY COURT.

(For majority opinion, see 57 W. Va. 165.)

BRANNON, PRESIDENT, (*concurring*:)

My opinion is, that the two sections, 7 and 8, of Article X of the Constitution have different objects. The object of section 7 is to limit the annual assessment by county authorities to 95 cents per $100 valuation; while section 8 has for its object to limit the power to incur debt and to prescribe the only mode in which debt can be incurred. It does seem to me that when section 7 says that no more taxes shall be assessed in one year than 95 cents on the $100, it means that no more *expenditure* shall be made than to that extent. It therefore does not mean that if the county court levy too little to pay expenditures in a given year a lawful expenditure or contract of that year, or a draft for it, is void, if there be yet room for it between the per cent of actual levy and the 95 cents. Provision may be made for its payment, so it and all antecedent allowances do not exceed the 95 per cent. An allowance, a draft, a contract made for an expenditure of that year, so that it and antecedent ones do not overgo the 95 cent limit, is not void, and this is simply because section 7 allows expenditure up to that 95 cents. A contract or allowance made for expenditure of that year when antecedent expenditures overgo the limit is void; if that and those antecedent expenditures do not overgo that limit, it is not void. Those passing that limit incur a debt contrary to section 8; those that do not overgo the limit are valid under section 7, and are not debts under section 8, and do not violate section 8. If a contract, or an order under it, is valid when made, it is not void simply because the levy may not reach it. See in *List* v. *Wheeling*, 7 W. Va. 523; *Armstrong* v. *County Court*, 41 W. Va. 602; *Hanley* v. *County Court*, 50 W. Va. 439. If one or more drafts be illegal, shall they taint all made before during the fiscal year? It does not appear in this case whether this contract and drafts under it were, when made, in excess of the amount which could be raised by the 95 cent levy. I am not saying that a contract can be made payable in installments of different years.

I do not differ with JUDGE POFFENBARGER in the reasons he gives why the injunction cannot be sustained.

INDEX.

ACCIDENTAL KILLING. See *Homicide*, 4, 8.

ACCOUNT FILED. See *Mechanics' Lien*, 1, 2.

ACTION.

1. A suit in equity is commenced at the time process to answer the plaintiff's bill is issued, although the bill be not then filed. The bill, when filed, relates back to the time the process was issued. *Finance & Trust Company* v. *Fierbaugh*, 334.
   See *Liens*, 1.

ACTION AGAINST GUARANTOR. See *Guaranty*, 1.

ACTIONS AT LAW. See *Limitations of Actions*, 2.

ACTION FOR DAMAGES. See *Death*, 1.

ACTION PENDING. See *Limitations of Actions*, 3.

ACTUAL POSSESSION. See *Adverse Possession*, 5.

ADMISSIBILITY. See *Divorce*, 3.

ADMISSIONS. See *Death*, 1.

ADMISSIONS AS TO TITLE. See *Evidence*, 6.

ADVERSE POSSESSION.

1. A deed from a special commissioner purporting to be made under authority of a decree is admissible in evidence to give color of title for adverse possession, though such decree is not shown. *Wade* v. *McDougle*, 113.
2. Mere occasional grazing cattle or cutting timber or sod on land does not constitute adverse possession under the statute of limitations. *Id.* 114.
3. Actual inclosure by fence is not indispensable for adverse possession under the statute of limitations. It is sufficient if the possession be marked or held by inclosure by fence, by cultivation, residence, clearing, or any plainly visible and notorious manifestation of sole, exclusive possession, according to the nature of the case. *Id.*
4. Where there is no color of title, possession, for the purpose of adverse possession, is confined to the land in actual, open, notorious, exclusive occupation by inclosure by fences, residence, clearing,

ADVERSE POSSESSION—*Continued.*

cultivation or such other act, notorious and open, according to the nature of the case, telling the world of adverse possession under his own claim. *Id.*

5. The actual possession of the owner of a tract of land, lying adjacent to another tract of uncleared land, the title to which is vested in another person by a grant from the State, is not extended over a portion of such other tract by the acquisition of a junior patent, covering such portion and purporting to vest title thereto in the owner of such first mentioned tract, however long such possession may continue. To work an ouster of the elder patentee and hold adversely to him, the junior patentee must take actual possession of some part of the land included in the junior patent and within the boundaries of the senior patent. *Camden* v. *Lumber Co.*, 148.

See *Ejectment*, 4; *Tenancy in Common*, 2.

AFFIDAVIT. See *Syllabi Approved*, 1.

AFFIDAVIT OF SHERIFF. See *Taxation*, 1.

AGENT. See *Insurance*, 5; *Witness*, 1.

AGREED LINES. See *Boundaries*, 1.

AGREED STATEMENT OF FACTS. See *Estoppel*, 1.

ALLEGATA ET PROBATA. See *Taxation*, 2.

ALIMONY. See *Divorce*, 2.

AMENDMENT TO BY-LAWS. See *Building and Loan*, 2.

ANSWER. See *Bill in Chancery*, 1; *Fraudulent Conveyance*, 1.

APPEAL.

1. It is reversible error to give an instruction, presenting an hypothesis which has no foundation in the evidence adduced, unless the court can clearly see that it did not prejudice the exceptor. *Lewis, Hubbard & Co.* v. *Supply Co.*, 77.
2. This Court exercises its appellate jurisdiction by appellate process only, and where no such process has been allowed, this Court is without power to review for error. *Robinson* v. *Goldman's Admr.* 145.
3. A case in which the appeal allowed must be dismissed as improvidently awarded because not allowed from any order or decree in the cause. *Id.*
4. When an appeal is dismissed by an order of the Supreme Court of of Appeals, it stands dismissed and ended on the actual date of such order, and does not continue to exist as an appeal to the end of the term of the Supreme Court of Appeals. *Dunfee* v. *Childs*, 225.
5. In determining whether a matter is *res judicata* by a decision of an appellate court, when the order entered reverses a decree of the

APPEAL—*Continued.*

trial court, and remands the cause for further proceedings, according to directions given in the written opinion, filed at the time of the rendition of the decision, the opinion and record, as well as the order, are to be considered; and, if it appears from the record, that the parties between whom it is claimed there was an adjudtcation, were before the court, and the subject matter of the alleged adjudication brought into the suit, by pleadings relating thereto, and, from the opinion and order, that the matter was expressly decided, the parties are concluded by the decision in all further proceedings in the cause in the court below, as well as in all collateral proceedings, although the pleadings in the cause, viewed from the standpoint of a demurrant thereto, were insufficient. *Dent* v. *Pickens*, 274.

6. Not only all matters that were actually litigated, but also all others that the parties were bound, by the state of the pleadings, to assert, by way of defense to, or in support of, the demand or demands set up in a cause, are *res judicata* by the decision rendered therein. *Id.*

7. Where a motion is made to exclude the plaintiff's evidence because not sufficient to support a verdict in his favor, and the motion is overruled, and this Court reverses the judgment because of the insufficiency thereof, it will enter judgment for the defendant without remanding the cause, although the defendant introduces his evidence, where such evidence, taken, in connection with that of the plaintiff, does not support the verdict, and where it does not appear that injustice will result from so doing. *Anderson* v. *Tug River C. & C. Co.*, 302.

8. Where, at the conclusion of the evidence, the defendant asks for a peremptory instruction, directing a verdict in its favor, which the court refuses to give, and this Court reverses the judgment because the evidence is not sufficient to support the verdict, or because the verdict is contrary to the evidence, judgment will be entered by this Court for the defendant, without remanding the cause, unless satisfied that such course would be unjust. *Id.*

9. When an interlocutory decree is rendered in a cause which so far settles the principles of the cause as to make the decree appealable, and subsequent decrees carrying out the principles so settled, are entered in the cause, an appeal from such interlocutory decree alone, will not bring up for review such subsequent decrees, although the same were entered long prior to the granting of such appeal. *Hopkins* v. *Prichard*, 363.

10. After the reversal of the interlocutory decree on such appeal, the subsequent decrees mentioned not having been set aside, reversed, or corrected by bill of review, appeal, or otherwise, the same remain firm and valid, although inconsistent with the judgment of this Court, in reversing the first mentioned decree. *Id.*

11. Where the circuit court on motion excluded all of the plaintiff's

APPEAL—*Continued.*

evidence, directed a verdict for defendant and dismissed the action, and upon writ of error to the judgment it appears that material and proper evidence offered by plaintiff during the progress of the trial was improperly rejected to the plaintiff's prejudice, this Court will reverse the judgment, set aside the verdict, award a new trial, and remand the case. *Hanley, Admr.* v. *Railway Co.*, 420.

12. Where it appears, upon consideration of all the facts and circumstances in the cause, that the action of the lower court in denying the motion of a party for a continuance, and in ruling him into a hearing, was plainly erroneous, the appellate court will reverse such action and the decree against him. *Yokum v. Stalnaker*, 677.

13. A verdict clearly inconsistent with all the controlling facts in the case, none of which are in any way controverted, will be set aside, as being contrary to the law and the evidence. *Casto* v. *Baker*, 683

See *Homicide*, 14; *Evidence*, 1, 9.

ASSUMPTION OF PAYMENT. See *Usury*, 2.

APPURTENANCES TO BUILDING. See *Mechanics' Lien*, 5.

ASSESSMENT TO LESSEE. See *Taxation*, 8.

ASSIGNMENT OF FUND. See *Fraudulent Conveyance*, 1.

BAIL.

1. A recognizance given in a criminal proceeding, conditioned for the appearance of the accused before a circuit court on the first day of a certain term thereof, and that he will not depart thence without leave of court, can only be forfeited by calling the accused upon the recognizance at some time during the term, and if he fails to appear, by entering his default of record. *State* v. *Dorr and McElwain*, 188.
2. If the term at which the accused is recognized to appear adjourns without his default having been entered of record, the recognizance cannot thereafter be forfeited, and the recognizors will be discharged from liability thereunder. *Id.*
3. In a proceeding by *scire facias* upon a recognizance given in a criminal proceeding, oyer of the recognizance and of the record upon which it is founded, may be demanded. *Id.*

BILL. See *Divorce*, 1.

BILL IN CHANCERY.

1. An allegation in a bill, which, by reason of its vagueness and uncertainty, fails to show materiality of its subject-matter, need not be answered. *Burkheimer* v. *B. & L. Ass'n*, 210.

BILL OF EXCEPTIONS. See *Criminal Law*, 8; *Error*, 1; *Writ of Error*, 1.

BILLS AND NOTES.

1. A person receiving a check on a fund in the hands of a bank, for the amount of a demand against the drawer thereof, is bound to exercise reasonable diligence in making presentment thereof for payment, if he wishes to avoid risk of loss by insolvency of the drawee. *Lewis, Hubbard & Co.* v. *Supply Co.*, 75.

2. If the payee of the check and the drawee reside, or have their place of business, in the same city or town, presentment must be made before the expiration of business hours of the day next after the day of the receipt thereof. *Id.*

3. If the person receiving a check and the bank on which it is drawn are in different places, it must be forwarded, for presentment, by mail or other usual mode of transmission, on the next day after the receipt thereof at the place in which the payee resides or does business, if reasonably and conveniently practicable; and, if it is not so practicable, then by the next mail or other similar means of conveyance, leaving after said date. *Id.*

4. Neither payee nor his agent is required to transmit such check by the only, or last, mail of the day next after its receipt, if such mail closes or departs at an hour so early as to render it inconvenient for the holder to avail himself of it. *Id.* 76.

5. What is an unreasonably early hour in such case depends upon all the circumstances of the transaction and situation of the parties: and, the facts being free from controversy and doubt, is a question of law for the court. *Id.*

6. In the absence of any agreement to the contrary, and of any circumstance, known to the payee, making it imprudent to do so, he may endorse and deliver the check to a bank for collection; but this does not extend the time within which it must be forwarded for presentment. The bank, however, in such case, is not required to forward it on the next day after its receipt by the payee, if there be no reasonably convenient means of doing so, within the banking hours of that day. *Id.*

7. Though the courts of this State cannot have judicial knowledge of the existence of any particular bank, or of any mode of business peculiar to a given bank, they will take judicial notice that, in all cities and towns of large population and extensive business, within their jurisdiction, banks exist, and of the fact that their operations are governed by reasonable rules and regulations, to which parties dealing with them, or in commercial paper, are deemed to have subjected themselves. *Id.*

8. Courts cannot take judicial notice of the business hours of any particular bank, but the courts of this State judicially know that ordinarily banks in the cities and larger towns of the State do not open their doors for business at an earlier hour than 9 o'clock A.M. *Id.*

9. The parties to a check drawn on a bank and sent to a distant

BILLS AND NOTES—*Continued.*

place to be forwarded for presentation, are deemed in law to have acted with knowledge of the usual diligent method of making such presentment through a bank at the place to which it is sent, and to have agreed to suffer any reasonable delay incident to such mode of presentment. *Id.*

10. In such case, the drawer, by allowing his funds to remain in the drawee bank, and the payee, by accepting the check, evince belief in the solvency of the bank, and the former voluntarily takes the risk of its solvency during the reasonable period necessary for presentment of the check in the usual manner. *Id.*
11. The drawer, in delivering a check to an agent of the payee, having no authority to endorse it, at the place of business of the drawer, impliedly agrees to allow such additional time for presentment as may be necessary for the transmission of the check to the principal of the agent. *Id.*
12. Failure to present a check does not bar recovery from the drawer, if the time, intervening between delivery thereof and the failure of the bank, is not sufficient for presentment by the exercise of such diligence as the law requires. *Id.*

BILL OF REVIEW. See ***Equity***, 1, 4, 5; ***Lis Pendens***, 1.

BONA-FIDE PURCHASER. See ***Fraudulent Conveyance***, 3; ***Vendor and Vendee***, 3.

BOUNDARIES.

1. To make valid an oral agreement to fix a line between two contiguous tracts of land there must be doubt and uncertainty as to the true place of the line, else the agreement is void. Where there is in fact, such doubt and uncertainty, such oral agreement, if at once carried into execution by actual possession, is valid without other consideration than the settlement of disputed boundary. *Wade* v. *McDougle*, 113.
2. A mutual express agreement between adjoining owners fixing their dividing line is of no force, unless actually executed immediately by taking possession actual up to it. *Id*
3. To establish a line between adjoining owners, in absence of express agreement fixing it, by acquiescence and recognition, there must be possession actual up to it by the party claiming the benefit of the line at least for a time prescribed by the statute of limitation, with acquiescence and recognition of such line by the other party, he knowing of such claim by his adversary. *Id.* 114.

BOUNDARY LINES. See ***Ejectment***, 3.

BREACH. See ***Guaranty***, 2.

BURDEN OF PROOF. See ***Cancellation of Instruments***, 3; ***Death***, 2; ***Ejectment***, 6; ***Physicians & Surgeons***, 1; ***Principal & Agent***, 1; ***Homicide***, 10, 11, 12; ***Taxation***, 6.

BUILDING AND LOAN ASSOCIATIONS.

1. Suspension, by a building and loan association, of the payment of dues on its stock by its members, for an unreasonable time, so as to work a material departure from its general plan and scheme of satisfying loans, made to its members, of the ultimate value of their shares of stock, by maturing the stock, affords ground for dissolution of the contractural relations existing between it, and a member to whom such loan has been made. *Burkheimer* v. *B. & L. Ass'n*, 209.

2. A borrower is not estopped from demanding such dissolution, under such circumstances, by his having voted for an amendment to the by-laws of the association, conferring upon its directors power to suspend payment of dues. *Id.*

3. When, by reason of gross mismanagement of a building and loan association, a member who has borrowed from it the ultimate value of the stock subscribed by him, has the right to sever his relations with it, and elects to do so, he is to be charged with the amount of the loan and legal interest thereon from the date on which he received the money, and credited with the interest and premium paid, until the date on which his right to withdraw accrued, and the value of his stock as of said date, as nearly as the same can be ascertained, making due deductions for his share of the expenses and losses sustained up to that date; and, on the balance thus found to be due from him, he is to be charged with interest and credited with all payments thereafter made by him, whether on account of dues, interest or premium; and, in applying credits, before, on and after said date, the rule governing partial payments is to be observed and followed. *Id.*

4. A building and loan association contract of loan, stipulating for the payment of a monthly premium, limited to a certain number of payments, is not violative of the provisions of section 26 of chapter 54 of the Code of 1899, relating to the premium in such contracts. *Id.*

5. A contract of loan with a building association, without naming a lump sum of premiums, provides that monthly premiums of fixed sum shall be paid for a fixed number of months. This fixes the amount and duration of payment of premiums with certainty and the contract is not open to the charge of usury. *Tahaney* v. *Building Association*, 296.

6. A contract of loan with a building association requires continuance of payment of lawful interest on the sum advanced, after cessation of dues and premiums, until the stock matures, unless it sooner matures. This does not make the contract usurious. *Id.*

7. When an application for a loan on stock by a building association makes a bid of premium and it is accepted, and the deed of trust securing it states that a certain premium was bid for the advance, the loan is not illegal as not being a competitive bid. *Id.*

CANCELLATION. See *Contracts*, 1.

CANCELLATION OF CONTRACTS. See *Specific Performance*, 3.

CANCELLATION OF DEEDS. See *Deeds*, 3.

CANCELLATION OF INSTRUMENTS.

1. To cancel a note and deed of trust to secure it on the claim that they were given for a contemplated loan, and that the loan was never made, the oral proof must be very full, clear and convincing *Brown* v. *Click*, 172.
2. A decree of cancellation of a deed for land for fraud, or duress, or want of consideration, cannot be made against a purchaser for valuable consideration without notice of the facts tainting the deed with fraud, duress or want of consideration. *Dunfee* v. *Childs*, 226.
3. In a suit, brought by a son after the death of his father, to set aside, for mental incompetency and undue influence, deeds made by the father, while aged, infirm and feeble in mind, by which he had granted the whole of his real estate to his wife and a daughter who resided with him, to the exclusion of his other children, all of whom were of mature age, married and residing elsewhere, the burden of proving both undue influence and mental incompetency is upon the plaintiff. *Teter* v. *Teter*, 449.

CANCELLATION OF POLICY. See *Insurance*, 6.

CHATTEL REAL. See *Taxation*, 8.

CIRCUMSTANTIAL EVIDENCE. See *Criminal Law*, 6.

CLAIMS AGAINST ESTATE. See *Limitation of Actions*, 1.

COAL LANDS.

1. Deeds conveying coal with rights of removal should be construed in the same way as other written instruments, and the intention of the parties as manifest by the language used in the deed itself should govern. *Griffin* v. *Coal Co.*, 480.
2. The vendor of land may sell and convey his coal and grant to the vendee the right to enter upon and under said land and to mine, excavate and remove all of the coal purchased and paid for by him, and if the removal of the coal necessarily causes the surface to subside or break the grantor cannot be heard to complain thereof. *Id.*
3. Where a deed conveys the coal under a tract of land, together with the right to enter upon and under said land and to mine, excavate and remove all of it, there is no emplied reservation in such an instrument that the grantee must leave enough coal to support the surface in its original position. *Id.*

COLLECTION THROUGH BANKS. See *Bills and Notes*, 6.

COLOR OF TITLE. See *Adverse Possession*, 1, 4.

COLLECTION OF PURCHASE MONEY. See *Injunction*, 1.

COLOR OF TITLE. See *Unlawful Detainer*, 1.

COMMENCEMENT OF SUIT. See *Action*, 1.

COMMISSIONER'S DEED. See *Adverse Possession*, 1.

COMPETITIVE BID. See *Building & Loan*, 7.

COMPROMISE.

1. A person is not bound by an admission in an offer to compromise not accepted by the other party. *Wade* v. *McDougle*,114.

CONDUCT OF PARTIES. See *Mines & Minerals*, 3.

CONFESSIONS. See *Divorce*, 3.

CONSENT DECREE. See *Equity*, 7.

CONSPIRACY. See *Homicide*, 2.

CONSTITUTIONAL LAW.

1. Chapter 35 Acts of 1905, is not in violation of amendment 14 of the National Constitution, as wanting due process of law, or denying equal protection of the law. *Coal & Coke Co.* v. *Fox, Comr.*, 605.

CONSTRUCTION. See *Guaranty*, 1; *Mines and Minerals*, 1; *Contracts*, 2, 3.

CONTRACTS.

1. Where parties, competent to contract, enter into a contract, it will not be set aside in a court of equity on the ground of inadequacy of consideration, unless the inadequacy be so gross as to shock the conscience and to amount to proof of fraud. Courts of equity, as well as courts of law, act upon the ground that every person who is not, from his peculiar condition of circumstances, under disability is entitled to dispose of his property in such manner and upon such terms as he pleases; and whether his bargains are wise, discreet and profitable, or otherwise, are considerations not for courts of justice, but for the party himself, to deliberate upon *Deepwater Council* v. *Renick*, 343.
2. It is the duty of the court to construe contracts as they are made by the parties thereto, and to give full force and effect to the language used, when it is clear, plain, simple and unambiguous. *Griffin* v. *Coal Co.*, 480.
3. It is only where the language of a contract is ambiguous and uncertain and susceptible of more than one construction that a court may under the well established rules of construction interfere to reach a proper construction and make certain that which in itself is uncertain. *Id.*

CONTRACT OF LOAN. See *Building & Loan*, 5.

CORPORATIONS.

1. A corporation, duly incorporated under the provisions of chapter 55 of the Code, may sell real estate owned and held by it in its corporate name, without resort to a court proceeding under section 9 of chapter 57 of the Code. *Deepwater Council* v. *Renick*, 343.
2. A deed, which is not *ultra vires* as to a corporation, and which is executed in its corporate name and under its corporate seal, by its proper officers, and duly delivered, carries with it the presumption of authority in such officers to execute it and affix thereto the seal of the corporation. *Id.*

COURTS OF EQUITY.

1. Recission of contracts, affecting any estate or interest in land, on the ground of fraud in the procurement thereof, or mutual mistake of the parties in effecting the same, belongs to the exclusive jurisdiction of courts of equity. *Bruner & McCoach* v. *Miller*, 36.

COUNSEL FEES. See *Mechanics' Lien*, 8.

CREDIBILITY OF WITNESS. See *Instructions*, 3.

CRIMINAL LAW.

1. An instruction setting forth six forms of verdict, proper for findings on an indictment for murder, and telling the jury, that, under the indictment, they can return any one of said verdicts, is defective in failing to direct the attention of the jury to the requirement that any verdict so returned must be based upon the belief from the evidence; but if it appears from other instructions given at the same time, that the attention of the jury was repeatedly directed to this requirement, the giving of such instruction is not error. *State* v. *Clifford*, 1.
2. It is not error to give, as an instruction to the jury in a criminal trial, the following legal proposition: "The court instructs the jury that to constitute a willful, deliberate and premeditated killing, constituting murder of the first decree, it is not necessary that an intention to kill should exist for any particular length of time prior to the actual killing; it is only necessary that said intention should come into *existance* for the first time at the time of such killing, or at any time previous." *Id.* 2.
3. On the trial of an indictment for murder, it is not error to give instructions, presenting the theories of guilt of murder of the first and second degrees, and directing the attention of the jury to the presumption of guilt, arising from certain facts, in case the jury should believe them to be established by the evidence, if there is any evidence tending, in any appreciable degree, to prove such offense. *Id.*
4. A motion for a new trial based on alleged insufficiency of evidence is an appeal from the jury to the court on a question of law. *Id.* 3.

CRIMINAL LAW—*Continued.*

5. In passing on such a motion, the court does not re-try the case on the evidence nor disturb any findings made by the jury on evidence sufficient in law to sustain them. It simply determines whether, in law, the facts found, or which could have been found, constitute the right in action, or the offense charged. *Id.*
6. Syllabus, points 3, 4 and 5, *State* v. *Flanagan*, 26 W. Va. 116, approved and applied. *State* v. *Trail*, 175,
7. Where the jury are instructed upon the law relating to a particular subject, it is not error to refuse to give other instructions to the same effect, as the court need not repeat instructions already substantially given. *State* v. *Dillard*, 198.
8. Where evidence is certified by the trial judge, and a separate bill of exceptions is used to make it a part of the record, a reference in the bill to the certificate of evidence, stating that it is made a part of the record, and a part of the bill of exceptions, is sufficient to make the evidence a part of the record. *State* v. *Sarah Ann Legg*, 315.
9. Where a justice, for the purpose of determining whether or not he will hold an inquest, takes the sworn statement of a person who is not, at the time, accused of killing the deceased, but against whom an indictment is afterwards preferred, such statement is admissible upon the trial of the accused; not having been made by the person as a witness upon a legal examination, it is not protected under section 20, chapter 152, Code 1899. A justice in taking such statement, is without warrant of law. *Id.*

DAMAGES. See *Personal Injury*, 1.

DEATH.

1. In an action under sections 5 and 6 of chapter 103, Code (1899,) for damages for the death of a person caused by a wrongful act, neglect or default, a plea to the merits of the action admits the representative character in which the plaintiff sues. *Hanley Admr.* v. *Railway Co.*, 419.
2. This action being founded upon negligence, the burden of proof is upon the plaintiff to show that the defendant has been negligent. Negligence will not be presumed alone from the explosion of a locomotive boiler, in use in lawful business upon the tracks of the defendant. *Id.* 420.

DECEASED PERSON. See *Witness*, 1.

DECISION. See *Appeal*, 5, 6.

DECLARATION OF DECEDENT. See *Homicide*, 9.

DECREE. See *Intoxication*, 2; *Infants*, 1; *Rescission of Contracts*, 2.

DEEDS.

1. A deed granting to a railroad company land for its right of way must contain on its face a description of the land in itself certain, so as to be identified, or if not in itself so certain, it must give such description as, with the aid of evidence outside the deed, not contradicting it, will identify and locate the land, otherwise the deed is void for uncertainty. *Hoard* v. *Railroad Co.* 91.
2. Though the grantor tender to the grantee a deed with intent to deliver it, yet if the grantee refuse to accept it, it is not a perfected deed, and passes no title. *Reel* v. *Reel*, 106.
3. Will a decree of the Supreme Court of Appeals reversing a decree of sale of land be alone ground for a bill to cancel a deed made to the purchaser under the decree by the debtor and owner of the land before reversal, when there is no other consideration for such deed than such decree of sale and purchase under it? *Dunfee* v. *Childs*, 225.
4. A threat by one having good title to land and entitled to possession as purchaser under a decree of sale, as against the debtor occupying the land, to eject such occupant by process under the decree of confirmation of sale does not constitute fraud or duress to set aside a deed made by such occupant to said owner. *Id.* 226.
5. A deed of the form prescribed by section 1, chapter 72, Code, containing the words "do grant," though it contain a covenant of only special warranty, will pass the very land itself, and all estate, right, title and interest of the grantor therein. *Id.*
6. To set aside a deed for fraud suit must be brought in a reasonable time, a time reasonable under circumstances of the particular case. Delay, especially where it affects third persons, will bar relief. *Id.*
7. When actual fraud is relied on to set aside a deed, the fraud must be clearly proved. This may be done by direct or by circumstantial evidence, or by both. *Deepwater Council* v. *Renick*, 343.
8. Mere infirmity of mind and body is not sufficient to overcome ths legal presumption of mental capacity in a grantor. In order to to have such effect, the evidence must show that he did not have sufficient understanding to clearly comprehend the nature of the business he was transacting. *Teter* v. *Teter*, 449.
9. Old age, physical infirmity and disease and feebleness of intellect, on the part of a grantor, together with the fact that he granted the whole of his estate to his wife and one daughter, who resided with him, and upon whom he was dependent for personal care and attention, to the exclusion of all his other children, raise no legal presumption of undue influence. They are only circumstances slightly tending to establish it. *Id.*

DEEDS—*Continued.*

10. That, in such case, the disposition made of the grantor's property is wholly different from what had previously been intended, as shown by a will executed by him at an earlier date, is a circumstance from which undue influence may, under certain conditions, be inferred; but, if it further appear that, at the time of the execution of the deed, proceedings were pending for the enforcement of liens upon the grantor's real estate for the discharge of which no funds were at hand or within reach; and that such indebtedness weighed heavily upon his mind at the time of the execution of both the will and the deed, this circumstance, together with other facts set out in detail in the opinion in the case, affords grounds for a strong inference to the contrary. *Id.*
11. In construing a deed in which there is a latent ambiguity as to a boundary line, occasioned by disagreement between monuments and marked lines, on the one hand, and magnetic courses, on the other, therein specified, as matter of description, the intention of the parties, which is the controlling factor in the problem, is to be ascertained from the facts and circumstances attending the execution of the deeds, and the situation and conduct of the parties, and as a rule of law, they are presumed to have been influenced and controlled by facts of which they had knowledge rather than by things of which they knew not. *Casto* v. *Baker*, 683.

See *Corporations*, 2; *Coal Lands*, 1.

DEED FOR OIL. See *Mines & Minerals*, 4.

DEFECTIVE TITLE. See *Injunction*, 1, 2.

DEFENSES. See *Homicide*, 4, 11.

DEGREES OF OFFENSE. See *Criminal Law*, 3.

DELIBERATION. See *Criminal Law*, 2; *Homicide*, 6.

DELIVERY. See *Deeds*, 2.

DEMURRER. See *Divorce*, 1.

DENIAL. See *Sylabi Approved*, 1.

DENIAL OF CONTINUANCE. See *Appeal*, 12.

DEPOSITIONS.

1. A deposition of a witness who resides out of this State, taken out of this State in conformity with section 33, chapter 130, Code 1899, in an action at law pending before a circuit court of this State, may be received, when properly certified under the hand of the notary public before whom it was taken, although not under his official seal, if otherwise proper. *Hanley, Admr.*, v. *Railway Co.*, 420.

DEPOSITIONS—*Continued.*

2. A deposition of a witness taken out of this State, in an action at law pending in a circuit court of this State, may be read upon the trial of such action, if the deposition shows that the witness resided out of this State when it was taken and if otherwise proper, unless it appears that the witness is in this State when the deposition is offered. *Id.*

See *Divorce*, 2; *Equity*, 1.

DESCRIPTION. See *Deeds*, 1.

DEVISEES. See *Wills*, 1.

DILIGENCE. See *Bills and Notes*, 1.

DIRECTING VERDICT. See *Trial*, 3.

DISCRETION OF COURT. See *Stay of Proceedings*, 1.

DISMISSAL. See *Writ of Error*, 2; *Appeal*, 3, 4.

DISMISSAL OF ACTION. See *Limitation of Actions*, 1.

DISSOLUTION OF CONTRACT. See *Building & Loan*, 1, 2.

DIVORCE.

1. A bill for divorce has two grounds or matters for relief. It charges adultery calling for absolute divorce, and desertion calling for decree of separation. The bill does not name a *particeps* in the adultery, or give time, place and circumstance. If the bill be bad therefor, a demurrer, being general, is properly overruled. *Trough* v. *Trough*, 464.
2. A court has no power to strike out and disregard depositions filed by a defendant in defense of a suit for divorce, for failure to pay money required of him to enable his wife to prosecute her suit and for temporary alimony, and pass final decree of divorce against him. Such decree is not due process of law. *Id.*
3. Confessions of adultery made in the country cannot be given in evidence or considered in a suit for divorce for such offense. *Id.*

DOUBLE TAXATION. See *Taxation*, 9.

DUE PROCESS OF LAW. See *Constitutional Law*, 1.

DUES. See *Building & Loan*, 1.

DURESS. See *Deeds*, 4.

EJECTMENT.

1. A plaintiff in ejectment must locate his own land and recover upon his own title, and the fact that the defendant's land does not cover the land in dispute or lie where the defendant claims it to lie, or that his title is not good, is immaterial and irrelevant. *Wade* v. *McDougle*, 113.
2. A verdict and judgment in ejectment by which the plaintiff recovers land in fee, of their own force, vests title in him, and take title, from the defendant, if he had any. *Id.*
3. A verdict and judgment in ejectment fixing a line are final and conclusive between the parties and their privies in estate as to the location of such line. *Id.*
4. A verdict and judgment in ejectment by which the plaintiff recovers the contested land destroy all title in the defendant at the date of the judgment. The defendant, by adverse possession beginning after judgment, may acquire title, but possession prior to the judgment cannot be considered. *Id.*
5. In ejectment, the plaintiff must establish title to the identical land which he seeks to recover from the defendant. The defendant's possession thereof will be deemed to be lawful until the contrary appears. *Pennington* v. *Underwood*, 340.
6. Where the plaintiff in ejectment claims under a grant of all the land within a given boundary, excluding certain parcels embraced therein, the burden is on the plaintiff to locate the outer boundary of his grant and the boundaries of the parcels excluded therefrom, and to show that the land he seeks to recover from the defendant is within the outer boundary of the plaintiff's grant and without the boundaries of the excluded parcels.
7. If the evidence on the trial of an action of ejectment shows that the plaintiff is entitled to hold a part, share or interest (less than the whole) of or in the land sued for, and that the defendant is entitled to hold a part, share or interest (less than the whole) of or in said land, the verdict should specify and describe the part, share or interest which each of the parties is entitled to hold. *Clark* v. *Beard*, 669.

ENFORCEMENT. See *Mechanics' Lien*, 8.

ENTICING SERVANT. See *Master and Servant*, 1.

ESTOPPEL.

1. Where an action of ejectment is brought and submitted upon an agreed statement of facts, and before the decision thereof the defendants move to withdraw such agreed statement of facts, and file a bill in equity setting up a matter of equity not cognizable in such action, and praying for an injunction restraining the prosecution of the action of ejectment, [such agreed statement of facts will not estop them from setting up such equity and enjoining the prosecution of such action. *Gentry* v. *Poteet*, 408.

   See *Insurance*, 5.

ERROR.

1. A bill of exceptions, relied on to make the evidence a part of the record in an action at law, must incorporate, or have annexed to it, the evidence, or contain a sufficient description or other means of identification of such evidence. Otherwise the bill is insufficient to make the evidence a part of it or of the record. *Woods* v. *King*, 418.

See *Evidence*, 4.

EQUAL PROTECTION OF LAWS. See *Constitutional Law*, 1.

EQUITY.

1. Upon a bill of review for error of law depositions cannot be considered. *Dunfee* v. *Childs*, 225.
2. A bill of review for error of law cannot be maintained while an appeal is pending in the Supreme Court of Appeals. *Id.*
3. A pleading in equity is taken to be what it is in substance, regardless of its form, or the name given to it by the pleader. *Finance & Trust Co.* v. *Fierbaugh*, 334.
4. A decree of the Supreme Court reversing, for error of law, a decree under which land is sold, is not newly discovered evidence for a bill of review to reverse a later decree of a circuit court dimissing a bill filed to set aside a deed made to the purchaser under such decree of sale by the former owner of the land after the sale and its confirmation. *Dunfee* v. *Childs*, 225.
5. The reversal by the supreme court is not newly discovered evidence or matter for a bill of review to reverse a decree of a circuit court made before such reversal. *Id.*
6. An *ex parte* affidavit offered by one party, cannot, over the objection of the adverse party, be considered by the court upon the hearing of a chancery cause upon its merits, in the determination of the issues raised by the pleadings, where there has been no previous consent that such affidavit may be so considered, and no consent to, or waiver of notice of, the taking of such affidavit. *Herold* v. *Craig*, 353.
7. A draft of a consent decree, agreed to and signed out of court by the parties to a pending cause, cannot be entered as a consent decree, if at the time such draft is offered for entry consent thereto is withdrawn, and its entry is objected to by one of the parties who signed it and who will be materially affected thereby. *Id.*
8. Where the purchaser under such contract has continued in possession cutting, manufacturing into lumber and removing the timber, refusing to pay anything on account of the purchase money, and refusing to make the notes for the monthly payments of the purchase-money as required by the contract; equity will give the vendor a right to hold the manufactured product remaining on the premises liable to the purchase money past due him. *Spies* v. *Butts*, 385.

EQUITY—*Continued.*

9. The plaintiffs and those under whom they claim are not guilty of *laches* in asserting their rights. *Gentry* v. *Poteet*, 409.

EVIDENCE.

1. Refusal of the court to permit a witness to answer a question which, by its own terms and subject matter, taken in connection with facts and circumstances, already in evidence, shows its relevancy and materiality, is not available as error on a motion for a new trial, if the expected answer of the witness was not disclosed to the court at the time of the ruling. An appellate court, in reviewing a judgment on writ of error, cannot assume, in such case, that an answer favorable to the exceptor would have been given. So much of the decision in *Gunn* v. *Railroad Co.*, 36 W. Va. 165, as conflicts with this principle, is disapproved. *State* v. *Clifford*, 2.

2. The genuineness of a letter is sufficiently established to permit its introduction in evidence when it is shown that it was received in due course of mail in response to a letter sent to the supposed writer. *Loverin & Browns Co.* v. *Bumgarner*, 37.

3. And upon notice having been given to such writer to produce the original of the letter to which his was a reply and his failure to produce such original, a letter press copy thereof is admissible in evidence. *Id.*

4. The admission of incompetent evidence over objection will not reverse a judgment when it is clear that such error could have worked no prejudice to the exceptor. *Id.*

5. Statements by a person cutting timber on land or cultivating it, that he is so doing under authority of a certain person as owner, made while so doing, are admissible when the question of possession by such owner is involved. *Wade* v. *McDougle*, 113.

6. Where legal title to land is vested in one his mere oral disclaimer or admission of no title cannot devest his title. It binds him not. *Id.* 114.

7. An expert witness may give an opinion, in a proper case, based upon his own knowledge of facts disclosed in his testimony, or he may give an opinion upon the facts shown in evidence, and assumed in a hypothetical question submitted to him. *Hanley Admr.* v. *Railway Co.*, 420.

8. On the question of the competency of a grantor to execute a deed, the value of the opinions of non-expert witnesses, who have had opportunity to form intelligent opinions, respecting his competency, depends upon the reasons therefor afforded by the facts upon which they are predicated, as stated by the witnesses. Where the opportunities of such witness to obtain knowledge of the grantor's mental condition have been but slight, and the facts given are meager, such evidence is entitled to but little weight. *Teter* v. *Teter*, 449.

EVIDENCE—*Continued.*

9. One who resists a motion made by a party introducing improper evidence to exclude it from the jury cannot complain, on appeal, of its introduction. *Comer* v. *Ritter Co.*, 688.

See ***Adverse Possession***, 1; ***Appeal***, 1; ***Criminal Law***, 8, 9; ***Cancellation of Instruments***, 1; ***Equity***, 6; ***Error***, 1; ***Exceptions***, 1; ***Intoxicating Liquors***, 2; ***Trial***, 4; ***Trusts***, 2; ***Unlawful Detainer***, 2; ***Deeds***, 7, 10, 11; ***Homicide***, 1, 2, 5, 6, 9, 15, 21.

EVIDENCE OF AGENCY. See ***Principal and Agent***, 1.

EVICTION OF VENDEE. See ***Injunction***, 3.

EXCEPTIONS.

1. A case in which a bill of exceptions as signed by the judge did not make the evidence taken at the trial a part of the record. *Schwarzchild* v. *R. R. Co.*, 649.

EXCEPTION IN DEED. See ***Mines and Minerals***, 4.

EXECUTORY CONTRACTS. See ***Equity***, 8; ***Specific Performance***, 2; ***Vendor and Vendee***, 1.

EX-PARTE AFFIDAVIT. See ***Equity***, 6.

EXPERT TESTIMONY. See ***Evidence***, 7.

FAILURE TO CURE. See ***Physicians and Surgeons***, 4.

FILING LIEN. See ***Mechanics' Lien***, 3.

FIRE INSURANCE. See ***Insurance***, 5.

FOREIGN BUILDING AND LOAN ASSOCIATION.

1. Failure of a foreign building and loan association to comply with the provisions of section 30 of chapter 54 of the Code of 1899, does not preclude it from transacting business in this state. *Burkheimer* v. *B. & L. Ass'n*, 210.

FORFEITURE. See ***Bail***, 1, 2.

FORWARDING BY MAIL. See ***Bills and Notes***, 3.

FRAUD.

1. Actual fraud cannot be established alone by proof of circumstances raising only a suspicion of fraud, but the evidence and circumstances must be of such character as to clearly establish such fraud. *Deepwater Council* v. *Renick*, 343.

2. Inadequacy of consideration, although not so gross as to shock the conscience and amount to proof of fraud, may nevertheless be

FRAUD—*Continued.*
considered with other evidence or circumstances in determining the question of fraud. *Id.*
See *Courts of Equity*, 1; *Specific Performance*, 2, 3; *Deeds*, 4, 7.

FRAUDULENT CONVEYANCE.
1. The answer of an assignee to a bill, attacking an assignment of a fund, as having been fraudulently made, must deny notice of fraudulent intent of the assignor, as well as fraudulent intent on the part of the assignee. Failure to deny it is equivalent, in legal effect, to an admission of the truth of the allegation of notice. *Dent* v. *Pickens*, 274.
2. The answer of an assignee, responding to a bill charging fraud in the assignment, specifically denies the fraudulent intent imputed to him by the allegations of the bill, says nothing as to the fraudulent intent imputed to his assignor, is silent as to the allegation of notice of the fraud of the latter, and denies generally each and every charge or intimation of fraud charged against respondent in plaintiff's original and amended bills; and there is no exception to said answer. *Held*, the general denial is insufficient to negative fraudulent intent of the assignor and notice thereof to the assignee. *Id.* 275.
3. One who claims title to property or a fund as a *bona fide* purchaser without notice must allege, not only that he is a purchaser for value, but also that he had no notice of the fraudulent intent of his vendor or his assignor. It requires both payment of adequate consideration and want of notice of fraud to make out a title in such case. *Id.*

FUNCTION OF COURT. See *Criminal Law*, 5.

GENERAL DENIAL. See *Fraudulent Conveyance*, 2.

GIFT TO MINOR. See *Intoxicating Liquors*, 2.

GUARANTY.
1. The following written guaranty made by J. H. B. to L. & B. Co. for the benefit of his infant son H. B. viz.: "For the purpose of enabling H. Bumgarner to purchase goods upon credit from Loverin & Browne Co., of Chicago, I hereby guarantee that said H. Bumgarner shall promptly pay them for all goods which they may hereafter sell to him upon credit until this guarantee is revoked. Said payment to be made within ten (10) days after receiving goods, my liability hereinunder shall cover any balance to become due not exceeding Five Hundred Dollars. Goods ordered under this Guarantee may be returned within ten days after receiving same at invoice price if goods are returned in good order properly packed. Dated, Elizabeth, W. Va., July 11th, 1903. J. H. Bumgarner. (Seal)." *Held*, to be a guaranty of payment absolute and unconditional, up-

GUARANTY—*Continued.*

on which a suit may be commenced against the guarantor without any previous suit against the principal. *Loverine & Brown Co.* v. *Bumgarner*, 46.

2. When the terms of a guaranty of payment fix the time within which the payment shall be made, if the payment is not made within the time prescribed there is a breach of the guaranty and no steps need be taken against the principal, nor need his insolvency be shown in order to charge the guarantor. *Id.* 47.

HOMICIDE.

1. On the trial of an indictment for murder, evidence of threats, made by the deceased or his co-conspirator, previously communicated to the accused, is competent and proper for the purpose of shedding light upon the mental attitude of the prisoner toward the deceased at the time of the homicide, and of explaining the possession of the weapon with which the killing was effected, as tending to rebut any inference of malice which might be drawn from the fact of its possession on the occasion of its use. *State* v. *Clifford*, 1.
2. When, in such case, there is evidence tending to establish a conspiracy on the part of the deceased, and other persons, to kill the accused, or do him grave bodily injury, and to show that the accused believed, and had reasonable ground to believe, that such conspiracy existed and the deceased was a party thereto, and the killing ensued, immediately after an unprovoked assault upon, and severe beating of, the accused, by such other persons, the deceased, standing by at the time, and there being evidence tending to show that he joined in the assault, evidence of threats made by such other persons and communicated to the accused before the assault, is admissible. *Id.*
3. When the homicide, in respect to which the accused is on trial, immediately followed an unprovoked assault upon, and severe beating of, him, and the evidence tends to prove the offense of manslaughter, the court may properly give instructions based upon the theory of guilt of murder, if there is any evidence in the case tending to prove the commission of such crime. *Id.*
4. The defense of accidental and unintentional killing does not preclude the giving of instructions embodying the law relating to any offense charged in the indictment which the evidence tends to prove. *Id.*
5. A sudden intentional killing with a deadly weapon, by one who is not in any way at fault, in immediate resentment of a gross provocation, is *prima facie* a killing in heat of blood, and, therefore, an offense of no higher degree than voluntary manslaughter. *Id.* 3.
6. When, in such case, the evidence discloses that no time intervened between the giving of the provocation and the act of killing, within which passion could have subsided and reason regained its dominion and the fatal act itself was not attended by circumstances of extreme cruelty and inhumanity, nor preceded by conduct from

HOMICIDE— *Continued.*

which malice can be inferred, a conviction of murder in the second degree should be set aside and a new trial allowed. *Id.*

7. In homicide cases, the question of malice is for the jury when there is sufficient evidence to sustain a finding of its existence. Whether there is any evidence of it is a question for the court in giving or refusing instructions. Whether there is sufficient evidence of it to sustain a verdict, is for the court on a motion for a new trial. *Id.*

8. In cases where the blow intended for one person by accident falls upon and kills another, the thing done follows the nature of the thing intended to be done, and the guilt or innocence of the slayer depends upon the same considerations that would have governed had the blow killed the person against whom it was directed. Hence the homicide is murder or manslaughter, or excusable homicide, for precisely the same reasons that would have determined its character had the event conformed to the intent, and the principle is the same whether the misadventure proceeded from the misdirection of the blow or from a mistake in the identity of the victim. *Id.*

9. In a trial for murder, the uncommunicated declaration of the deceased of his purpose to have illicit intercourse with the daughter of the defendant, which he declared he could do "if he could get the old man drunk," is not admissible in evidence. *State* v. *Trail*, 175.

10. In the trial of an indictment for murder, if the homicide is proven to have been committed by the defendant then the presumption of murder in the second degree arises against the defendant and the burden of proof rests upon him to make such defense as will reduce the crime below such degree, or as will justify the act, and such defense may be found in the evidence adduced by the state and that of the defendant and all the circumstances of the case. *Id.*

11. Upon a trial for murder, where the killing is admitted, and the defendant relies upon self-defense, the burden is upon him to establish such defense to the satisfaction of the jury. *State* v. *Dillard*, 197.

12. Where, upon a trial for murder, the evidence introduced by the state to establish the homicide, tends to show extenuating circumstances, this does not relieve the defendant of the burden of establishing self-defense, if it is relied on, to the satisfaction of the jury; but the circumstances so shown are proper to be considered by the jury in arriving at their verdict. *Id.*

13. Upon a trial for murder, it is not error to refuse to instruct the jury that if they believe the prisoner, at the time of the killing, was so intoxicated as to be incapable of deliberation and premeditation, he should not be found guilty of murder in the first degree, where there is evidence tending to show that the defendant had

HOMICIDE—*Continued.*

previously designed the killing, and became voluntarily intoxicated for the purpose of committing the offense. The instruction should also present this theory to the jury. *Id.*

14. It is peculiarly within the province of the jury to weigh the evidence upon the question of self defense; and the verdict of a jury adverse to that defense will not be set aside unless it is manifestly against the weight of the evidence. *Id.* 198.
15. Upon the trial of a wife, for the murder of her husband, testimony tending to show the existence, prior to the alleged killing, of adulterous relations between the prisoner and a third person, is admissible, for the purpose of showing motive for the commission of the offense. *State* v. *Sarah Ann Legg*, 315.
16. Where, upon a trial for murder, the killing is shown to have been done with a deadly weapon, and the defendant relies upon accidental killing as an excuse, it is a question for the determination of the jury as to whether the killing was intentional, or the result of an accident. And when the evidence tends, in an appreciable degree, to establish both theories, it is the duty of the court to instruct the jury presenting both, if asked to do so. *Id.*
17. An instruction which tells the jury that before they can find the defendant guilty of murder, they must believe from the evidence beyond all reasonable doubt, that the defendant willfully, maliciously, deliberately, feloniously and unlawfully killed the deceased, is erroneous, in this, that it is not necessary that these elements should co-exist in order to find the defendant guilty of murder in the second degree. *Id.*
18. An instruction saying that before the jury could find the defendant guilty of murder, they must believe from the evidence beyond all reasonable doubt, that the defendant maliciously, feloniously and unlawfully killed the deceased, is erroneous in not limiting the instruction to murder in the second degree.
19. Where one, upon an indictment for murder, relies upon accidental killing as a defense, and there is evidence tending in an appreciable degree, to establish such defense, it is error to refuse to instruct the jury that if they believe from the evidence that the killing was the result of an accident, they should find the defendant not guilty. *Id.*
20. On a trial for murder, where the defense is that the killing was accidental, it is error to instruct the jury that they shall find the defendant not guilty if they believe the killing was the result of an accident, unless they further find that the defendant was guilty of criminal carelessness, without instructing as to what constitutes criminal carelessness, and without further qualifying the instruction so as to enable the jury, if they should find the defendant guilty of that offense, to properly fix the degree of crime. *Id.*
21. Where, upon a trial for murder, the defendant relies upon accidental killing as a defense, it is error for the court, when asked to

HOMICIDE—*Continued*
instruct the jury that if they believe from the evidence that the killing was accidental, and not intentional, they should find the defendant not guilty, to refuse to do so, and it is also error for the court to modify such instruction so offered as to present a theory of the case to them, when there is no evidence, or, if any, when it does not tend, in an appreciable degree, to support such theory. *Id.*
See *Criminal Law*, 2, 3.

ILLEGAL SALE. See *Intoxicating Liquors*, 1.

INADEQUACY OF CONSIDERATION. See *Contracts*, 1.

INCLOSURE. See *Adverse Possession*, 2.

INDEPENDENT CONTRACTORS. See *Negligence*, 1, 2, 3.

INDICTMENTS. See *Intoxicating Liquors*, 1.

INFANTS.
1. In a summary proceeding, under chapter 83 of the Code, for the sale of the timber on the land of an infant and sale thereof made upon a written proposition for purchase and under direction and decree of the court and duly confirmed; decrees, entered therein granting abatement to the assignee of the purchaser of a part of the purchase money and extending the time beyond that fixed in the contract of sale for the removal of the timber from the land, which decrees are based upon no pleadings in writing, but alone upon the mere oral representations and motion of the assignee of the purchaser of the timber, are void. *Lilly* v. *Claypool*, 130.
See *Personal Injury*, 1.

INFIRMITY OF MIND. See *Deeds*, 8.

INJUNCTION.
1. Equity will enjoin the collection of purchase money on land where the vendee is in possession under conveyance of covenants of general warranty, where the title to the land is questioned by suit, prosecuted or threatened, or where it is clearly shown to be defective. *Harvey* v. *Ryan*, 134.
2. Such injunction will not be granted unless the bill alleges facts showing a clear outstanding title in a stranger, and the burden will be on the plaintiff to prove the existence of that title. Allegations of defect of title, which do not show in what respect such defect exists, or facts which establish nothing more than that the title is doubtful or unmarketable, will not support the application for an injunction. *Id.*
3. Where a vendee has entered into possession of land, under deed with covenants of general warranty, and in an action of ejectment a stranger asserts title to and recovers the land, and the vendee is

INJUNCTION—*Continued.*

evicted, equity will enjoin the collection of the purchase money due the vendor therefor, upon proper bill filed for that purpose. *Id.*

4. At common law, the defense of failure of consideration could not be interposed, nor damages for a breach of warranty of title claimed by way of recoupment, against a sealed instrument. But while, under our statute, these defenses can be made at law, yet where, but for the statute, equity would have jurisdiction, such equitable remedy is not taken away because the remedy at law is given by statute. *Id.*

INSTRUCTION.

1. To determine whether the trial court has erred in the giving of instructions, all the instructions must be read together, and, if being so read and interpreted according to the plain common-sense meaning of the terms used, they state the law correctly as applied to the evidence, and it appears that the jury could not have been thereby mislead to the prejudice of the accused, the verdict will not be disturbed, because they disclose a mere technical conflict in terms. *State* v. *Clifford*, 2.
2. The purpose of giving instructions is to aid the jury in arriving at a proper verdict, and the practice of repeating them is discountenanced. *State* v. *Sarah Ann Legg*, 315.
3. It is not error, where an instruction is asked telling the jury that they are the sole judges of the credibility of the witnesses, and that they have the right to believe or not believe any witness who has testified in the case, to modify the instruction so as to tell them that they cannot arbitrarily disregard the testimony of a witness unless they believe it untrue. *Id.* 316.

See ***Appeal***, 1; ***Criminal Law***, 1, 2, 3, 7; ***Witness***, 2; ***Homicide***, 3, 16, 17, 18, 19, 20.

INSUFFICIENCY OF EVIDENCE. See ***Criminal Law***, 4, 5; ***Appeal***, 7; ***Judgment by Appellate Court***, 1.

INSURANCE.

1. An inventory of a stock of merchandise, within the meaning of the term "inventory," used in what is known as "The Iron Safe Clause" of a fire insurance policy, is a list of all the articles of merchandise in the stock, sufficiently itemized to show the kinds and numbers or quantities thereof, together with their values at the time of making the same, as nearly as they can be ascertained. *Ruffner Bros.* v. *Ins. Co.*, 432.
2. In the case of a store, opening with an entirely new stock of goods, at or about the date of the issuance of the policy, the invoices of the first lot of goods put into it, giving the quantities thereof by items, with the cost prices, if preserved and kept for production, upon the demand of the insurer, as and for an inventory, will con-

INSURANCE—*Continued.*

stitute such a list, and the insured will have substantially complied with so much of the policy as requires the taking of an inventory. *Id.*

3. In determining what constitutes such an inventory, regard must be had to the purpose for which it is required, and, in seeking this, all parts of the "Iron Safe Clause" should be read and considered together. *Id.*
4. Cancellation of a fire insurance policy, by an agent of the company, having no authority to waive conditions, except by endorsement on the policy or addition thereto, does not imply a waiver of a breach, previously made, of a promissory warranty therein contained, or estop the company from relying upon such breach as matter of defense to an action on the policy, though it be shown that the agents had knowledge of such breach. *Id.*
5. Violation of a clause of an insurance policy, declaring that it shall become null and void, if the hazard be increased by any means within the control or knowledge of the insured, is not waived by a letter, written at about the date of the fire, which caused the destruction of the property, by an agent of the company, having no authority to waive conditions, except by endorsement on the policy or addition thereto, notifying the insured that the policy is cancelled, and specifying said violation as the reason for cancelling it. *Id.* 433.

INTENT. See *Criminal Law*, 2.

INTENT OF PARTIES. See *Deeds*, 11.

INTEREST. See *Vendor and Vendee*, 1.

INTEREST CONVEYED. See *Deeds*, 5.

INTERLOCK. See *Adverse Possession*, 5.

INTERLOCUTORY DECREE. See *Appeal*; 9.

INTOXICATING LIQUORS.

1. In an indictment under sections 16 and 17, chapter 32, Code 1899, for selling intoxicating drinks to a minor, it is not sufficient to charge that the sale was made by a certain named person for the defendant. The indictment should charge that the sale was made by the defendant. *State* v. *Mayo*, 331.
2. H. placed a bottle of whiskey on a table and told F., the father of E., a minor under the age of twenty-one years, to take what he wanted of it and if he allowed the boy E. to have any of the liquor, that he was welcome to it; the father said he could have it, and the boy took up the liquor and drank of it in the presence of his father. *Held:* No offense under section 16, chapter 32, Code of 1899. *State* v. *Hammons*, 475.

INTOXICATION.

1. The execution of a writ of *habere facias possessionem* will be enjoined at the suit of a person in possession of the land to which it relates, who was not a party to the suit in which it was awarded and does not claim title thereto or the right to possession thereof under any party to such action or suit. *Bennett* v. *Preston*, 681.
2. In such case, the decree perpetuating the injunction will save to the parties the right to litigate all questions of title between them in any other proceeding, they or any of them may see fit to institute. *Id.*

INTOXICATION AS DEFENSE. See *Homicide*, 13.

INVALIDITY. See *Deeds*, 4.

INVENTORY. See *Insurance*, 1, 2, 3.

JUDGMENT.

1. A decree not supported by any pleading in writing is void. *Lilly* v. *Claypool*, 130.
2. Except in pure proceedings *in rem* nothing is *res judicata* by a decision as to persons who are not parties to the cause in which it was rendered; but the status of the property involved therein may have been so affected, by the pendency of the suit, as to have rendered it insusceptible of valid purchase or acquisition by strangers thereto, while the cause was pending or after decision, as against one who was a party to it. *Dent* v. *Pickens*, 274.
See *Ejectment*, 2, 4.

JUDGMENT BY APPELLATE COURT.

1. This Court on reversing a judgment for the plaintiff, and setting aside a verdict, for insufficiency of evidence, and refusal of the trial court to exclude the evidence from the jury and direct a verdict for the defendant, will not remand the case for a new trial, but will render judgment for the defendant, when it does not appear that injustice will be done thereby. [By four judges, POFFENBARGER, Judge, dissenting.] *Rufner Bros.* v. *Ins. Co.*, 433.

JUDICIAL COGNIZANCE. See *Bills and Notes*, 7.

JUDICIAL SALE. See *Vendor and Vendee*, 2.

JUNIOR PATENT. See *Adverse Possession*, 5.

KILLING IN HEAT OF BLOOD. See *Homicide*, 5.

LACHES. See *Equity*, 9; *Deeds*, 6.

LANDS. See *Infants*, 1.

LEASE. See *Unlawful Detainer*, 1.

LETTERS. See *Evidence*, 2, 3.

LIABILITIES. See *Master and Servant*, 2, 3, 4; *Mines and Minerals*, 2, 3.

LIABILITY OF DRAWER OF CHECK. See *Bills and Notes*, 10, 11, 12.

LIENS.

1. In a suit to sell real estate to satisfy mechanic's liens and judgment liens and also a subsequent trust lien, which covers a part only of the real estate so to be sold, it is error to decree the sale of the property as a whole. *O'Neil* v. *Taylor*, 371.

LIMITATION OF ACTIONS.

1. Executors bring a suit in equity to settle their accounts, setting up in their bill that Heavener claims a debt against their decedent, stating its nature, and denying it, and asking the court to adjudicate as to its validity. Heavener files an answer setting up his debt and asking a decree for it against the estate. The bill is dismissed for want of jurisdiction in equity. *Held*, Heavener is allowed one year after such dismissal to save a suit by him from the statute of limitations by force of section 19, chapter 104, Code 1899. *Heavener* v. *Hannah*, 476.
2. Section 19, chapter 104, Code 1899, applies to both suits in equity and actions at law. *Id.*
3. The time of the pendency of such suit is to be excluded from computation under the statute of limitations in a new suit for the debt, because the former suit is an obstruction under section 18, chapter 104, Code 1899. *Id*

LIS PENDENS.

1. A suit as a *lis pendens* ends with a final decree. A bill of review or appeal to reverse such decree is a new *lis pendens*, as regards purchasers claiming title under the decree, and is not a mere continuation of the original suit. *Dunfee* v. *Childs*, 226.
2. The rule *lis pendens* extends to non-negotiable choses in action and funds, for the subjection of which to the payment of a debt, a suit in equity has been instituted to set aside assignments thereof, as having been made in fraud of the plaintiff's rights. *Dent* v. *Pickens*, 274.

LOCATION OF BOUNDARIES. See *Ejectment*, 6.

MALICE. See *Homicide*, 7.

MALPRACTICE. See *Physicians and Surgeons*, 1.

MANSLAUGHTER. See *Homicide*, 3, 5, 6.

MASTER AND SERVANT.

1. One who maliciously entices a servant in actual service of a master to desert and quit his service is liable to action therefor. *Thacker Coal Co.* v. *Burke*, 253,
2. If one wantonly and maliciously, whether for his own benefit or not, induces a person to violate his contract with a third person to the injury of that third person, it is actionable. *Id.*
3. Persons who conspire to induce others to break a valid contract between other persons are liable to action therefor. *Id.*
4. The act found in Code of 1899, section 14, appendix, p. 1053, does not authorize any individual, or number of individuals, to maliciously entice servants to desert service in which they are engaged, or to prevent them from engaging in such service under a contract for such service. *Id.* 256.

MATTERS REVIEWABLE. See *Appeal*, 9.

MATURING STOCK. See *Building & Loan*, 1.

MECHANICS' LIEN.

1. In a contract directly with the owner, our statute does not require of the contractor an itemized account of work done and material furnished to enable him to procure his mechanic's lien, but he is required to file "a just and true account of the amount due him after allowing all credits together with a description of the property intended to be covered by the lien sufficiently accurate for identification, with the name of the owner or owners of the property, if known," *O'Niel* v. *Taylor*, 370.
2. A general statement of the demand of such contractor showing its nature and character, and the amount due or owing thereon after allowing all credits is a compliance with the statute. *Id.*
3. When repairs, improvements and additions are made to a building under contract directly with the owner and the work prosecuted to completion, dates when the several items of work was done and materials furnished are not material except that it must appear that the last work done and the last material furnished necessary to the completion of the work was done and furnished within sixty days before the filing and recording of the mechanic's lien. *Id.*
4. When a contractor uudertakes with the owner to make such repairs, improvements and additions, without a contract price as to the whole work but in the course of the work it is agreed that a certain sum shall be paid for a particular part of the work which is done along with the rest of the work, such sum may constitute one item in the general account, and form a part of the mechanic's lien although the work and material represented by said sum may have been done and furnished more than sixty days prior to the filing of the lien, *Id.*

MECHANICS' LIEN—*Continued.*

5. Under such general contract with the owner for such work and repairs where walks and fences on the premises are constructed as appurtenant to such building, and at the same time, the contractor is entitled under our statute to include the same in his mechanic's lien. *Id.*
6. And so, the price of a coal house and sample room, constructed on the premises under such contract appurtenant to and to be used with such building, used as a hotel, is proper to be included in such mechanic's lien. *Id.* 371.
7. A mechanic's lien may include an item for a drain pipe from the cellar of a house into a sewer in the street. Such drain pipe is a part of the house. *Id.*
8. In a suit to enforce mechanic's liens it is error to decree as part of plaintiff's costs "the sum of $300, counsel fees hereby allowed counsel for plaintiff for conducting this suit." *Id.*

MENTAL CAPACITY OF GRANTOR. See *Deeds*, 8.

MENTAL INCAPACITY. See *Cancellation of Instruments*, 3.

MINES AND MINERALS.

1. The following clause in a lease for oil and gas purposes imposes no obligation to pay rent: "Provided, however, that this lease shall become null and void and all rights hereunder shall cease and determine unless a well shall be completed on the said premises within three (3) months from the date hereof, or unless the lessee shall pay, at the rate of sixty-five and 25-100 (65 25-100) dollars, quarterly, in advance, for each additianal three months such completion is delayed from the time above mentioned for the completion of such well until a well is completed." *Smith* v. *South Penn Oil Co.*, 204.
2. If, having drilled one unproductive well under such a lease, and paid commutation money until the completion thereof, the lessee is permitted to drill another, without making further payments, and without notice that any compensation will be demanded or required of him for such further use and occupation of his premises, none can be recovered. *Id.* 205.
3. Suc contract being ambiguous as to what shall constitute a completed well, the conduct of the parties, in treating the completion of an unproductive well as an act sufficient to vest in the lessee ght to make further exploration without additional payments, is conclusive upon them, under the principle of practical construction. *Id.*
4. A deed conveys oil in land "except a well now producing oil." That well ceasing to produce oil is deepened by the lessee to a different sand rock, and produces oil from it. The exception excepts om the operation of the deed the oil produced from the lower sand rock. *Ammons* v. *Toothman*, 165.

MINING LEASE. See *Taxation*, 8.

MISMANAGEMENT. See *Building & Loan*, 3.

MISREPRESENTATIONS. See *Specific Performance*, 4, 5.

MISTAKE. See *Courts of Equity*, 1.

MISTAKE IN JUDGMENT. See *Physicians and Surgeons*, 5, 6.

MOTION FOR NEW TRIAL. See *Criminal Law*, 4, 5.

NEGLIGENCE.

1. Where one, for a stipulated price per piece, contracts to procure timbers for a mining company for use in its mine, from the lease of the company, and the company retains no supervision of the work, or control of the manner of doing it, and the contractor is responsible to it only to the extent of procuring satisfactory timber and delivering it at such time and places as needed, and employs and pays his own help in doing so, such contractor exercises an independent employment, and the company is not liable to one in its employ who is injured by the contractor in negligently prosecuting his work. *Anderson* v. *Tug River C. & C. Co.*, 301.
2. Where a competent and fit person renders services in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means of its accomplishment, such work not being in itself unlawful, or of such a nature that it is likely to become a nuisance, or to subject third persons to unusual dangers when being prosecuted in the usual and ordinary manner, such person exercises an independent employment, and the person so employing him is not liable for wrongs committed by him, his agents or servants in the prosecution of such work. *Id.*
3. Where, from the evidence, it is to be determined whether or not one is an independent contractor, and the evidence is so conflicting as to support a finding of the jury, then it is purely a question for their determination, but if the evidence is without conflict, it then becomes a question of law as to whether or not an independent employment has been established. *Id.*

See *Death*, 2.

NEWLY DISCOVERED EVIDENCE. See *Equity*, 4, 5.

NOVATION.

1. Novation is the substitution of one debtor by mutual agreement for another, whereby the old debt is extinguished. *Chenoweth* v. *Building Ass'n.* 653.

OBJECTIONS. See *Limitations of Actions*, 3.

OFFER OF EVIDENCE. See *Trial*, 1.

OIL AND GAS.

1. Owing to the peculiar nature of oil and gas, both the quantity and location of land covered by a lease thereof for oil and gas purposes, are elements going to the substance and essence of a contract of sale of such lease, obligating the vendee to develop the property by drilling a well thereon and deliver to the vendor part of the product thereof, free of cost or expense; and a gross misrepresentation, as to either, relied upon by the vendee, under the belief that it is true, is ground for rescission of the contract. *Bruner & McCoach* v. *Miller*, 36.

OIL LEASE. See *Mines and Minerals*, 1; *Oil and Gas*, 1.

OPINION EVIDENCE. See *Evidence*, 8.

ORAL CONTRACT AS TO LAND. See *Specific Performance*, 1.

OUSTER. See *Tennancy in Common*, 1.

PAYMENTS. See *Taxation*, 4, 5.

PAYMENT OF PURCHASE MONEY. See *Equity*, 8.

PAYMENT OF TAXES. See *Tennancy in Common*, 1.

PARTITION.

1. A sale of real estate in a partition suit cannot be decreed, unless it affirmatively appears in the record that partition cannot be conveniently made and that the interests of the parties entitled to such real estate will be promoted by a sale thereof. *Herold* v. *Craig*, 353.

PENDENCY OF APPEAL. See *Equity*, 2.

PENDENCY OF OTHER SUIT. See *Stay of Proceedings*, 1.

PERSONAL INJURY.

1. An infant cannot recover damages for loss of service during minority arising from personal injury. *Comer* v. *Ritter Co.*, 688.

PERSONAL PLEA. See *Usury*, 1.

PHYSICIANS AND SURGEONS.

1. In an action for damages against a physician for negligence and want of skill in the treatment of an injury or disease, the burden is on the plaintiff to prove such negligence or want of skill, resulting in injury to the plaintiff. *Dye* v. *Corbin*, 266.
2. A physician is not required to exercise the highest degree of skill and diligence possible, in the treatment of an injury or disease

PHYSICIANS AND SURGEONS—*Continued.*
unless he has by special contract agreed to do so. In the absence of such special contract, he is only required to exercise such reasonable and ordinary skill and diligence as are ordinarily exercised by the average of the members of the profession in good standing, in similar localities and in the same general line of practice, regard being had to the state of medical science at the time. *Id.*
3. A physician does not warrant or insure that his treatment will be successful, in the absence of special contract to that effect. *Id.*
4. Failure on the part of a physician to effect a cure does not alone establish, or raise a presumption of, want of skill, or negligence, on his part. *Id.*
5. Where a physician exercises ordinary skill and diligence, keeping within recognized and approved methods, he is not liable for the result of a mere mistake of judgment. *Id.*
6. A physician is liable for the result of an error of judgment, where such error is so gross as to be inconsistent with that degree of skill which it is the duty of a physician to possess. *Id.*

PLEADING. See *Death*, 1; *Equity*, 3; *Syllabi Approved*, 1; *Infants*, 1.

PLEADING AND PROOF.
1. In such action, a variance between the declaration and the proof, relating alone to the instrument by which a bodily injury was inflicted, is immaterial and should be disregarded, when the instrument alleged and the instrument proved are of the same general nature. *Hanley, Admr.* v. *Railway Co.*, 419.

POSSESSION. See *Adverse Possession*, 4; *Boundaries*, 2, 3; *Unlawful Detainer*, 1.

PREMIUM. See *Building & Loan*, 4.

PRESENTATION OF CHECKS. See *Bills and Notes*, 1, 2, 9.

PRESUMPTIONS. See *Death*, 2.

PRINCIPAL AND AGENT.
1. Where a tax deed is sought to be set aside on the ground that the vendee therein was the agent of the former owner to pay the taxes on the land conveyed, the burden is on the party seeking to set such deed aside to prove such agency. *Day* v. *Fay*, 65.

PROPERTY SUBJECT. See *Mechanics' Lien*, 6, 7.

PROCEDURE. See *Appeal*, 2.

PURCHASER. See *Vendor and Vendee*, 2.

PURCHASER FOR VALUE. See *Cancellation of Instruments*, 2.

QUESTION FOR JURY. See *Homicide*, 7; *Negligence*, 3.

RECEIVER.

1. The application for the appointment of a receiver is addressed to the sound discretion of the court. The appointment is not a matter of right. The power is a discretionary one to be exercised with great circumspection. The discretion is not arbitrary or absolute, but sound and judicial, not to be too strictly limited, or lightly used. *Spies* v. *Butts*, 385.
2. Where, under an executory contract of sale of many tracts of land and standing timber a cash payment is made and the purchaser agrees to give notes for the deferred monthly payments and takes possession of the subject of his purchase and proceeds to cut and manufacture into lumber and remove therefrom the timber and market the same as provided in the contract, but refuses to make any further payments on the purchase money or to make the notes therefor as required by the contract because of de ect of grantor's title tendered to the purchaser, the timber being the chief value of the land and unless operated the title to much of the timber would fail because the limited time in which it could be removed under the contracts by which it was held by the vendor. *Held:* Sufficient ground for the appointment of a receiver on the application of the vendor. *Id.*

RECORD. See *Criminal Law*, 8; *Error*, 1; *Writ of Error*, 1.

RECOVERY OF CONSIDERATION. See *Rescission of Contracts*, 3.

REDEMPTION. See *Taxation*, 8.

REFERENCE.

1. A commissioner may authorize any person to write his report at his dictation and under his supervision. It is not essential that it should be in his own handwriting. *O'Niel* v. *Taylor*, 370.

REFRESHING MEMORY. See *Witness*, 3.

REJECTION OF EVIDENCE. See *Trial*, 1.

REMEDY AT LAW. See *Injunction*, 4; *Rescission of Contracts*, 1.

REMOVAL OF COAL. See *Coal Lands*, 2.

RENDERING JUDGMENT. See *Appeal*, 7.

REPORT OF COMMISSIONER. See *Reference*, 1.

RESCISSION. See *Oil and Gas*, 1.

RESCISSION OF CONTRACT.

1. Courts of law have jurisdiction and power to afford relief, in such cases by judgment for money or property, under some circumstances, when a right to rescind exists and has been properly claimed; but the remedy at law is incomplete and inadequate, because of lack of power to effect a recission by a direct adjudication thereof. *Bruner & McCoach* v. *Miller*. 36.
2. On rescinding a contract, the court should, by its decree, put the parties in *statu quo*, by requiring each to restore to the other what he obtained by virtue of the contract. *Id.*
3. Money paid, as rental to the land owner, for delay in drilling a well under a lease, held by assignment, in accordance with the terms of the lease, may be recovered back on recission, when the contract of sale does not bind the vendee to drill, but extends to him the right to pay such rental in lieu of drilling. *Id.*
See *Courts of Equity*, 1.

RESERVATION IN DEEDS. See *Coal Lands*, 3.

RESULTING TRUST. See *Trusts*, 1.

RETENTION OF TIMBER. See *Equity*, 8.

REVERSAL. See *Appeal*, 7, 11.

REVERSIBLE ERROR. See *Appeal*, 1.

REVIEW. See *Appeal*, 2, 11, 12, 13; *Homicide*. 14.

RIGHT OF RECOVERY. See *Ejectment*, 1.

SALE. See *Liens*, 1; *Oil and Gas*, 1; *Partition*, 1.

SALE BY STATE. See *Taxation*, 3.

SALE OF LAND. See *Injunction*, 1, 2.

SALE OF REALTY. See *Corporations*, 1.

SALE OF TIMBER. See *Infants*, 1.

SCIRE FACIAS. See *Bail*, 3.

SEAL OF NOTARY. See *Depositions*, 1.

SELF DEFENSE. See *Homicide*, 11, 12.

SKELETON BILL. See *Exceptions*, 1.

SKILL REQUIRED. See *Physicians and Surgeons*, 2, 3.

SPECIFIC PERFORMANCE.

1. An oral contract by a father to convey land to his son in consideration that he shall support the father, is not enforceable in equity, unless the possession has been transferred to the son under the contract. *Reel* v. *Reel*, 106.
2. An executory contract for the sale of land will not be specifically enforced in favor of a vendor who has made material fraudulent misrepresentations, upon which the vendee relied in making the contract. *Cleavenger* v. *Sturm*, 658.
3. Equity will rescind such contract where such relief is asked by the purchaser. *Id.*
4. Misrepresentations, though in a slight degree, of material facts, relied upon by the vendee, will defeat specific performance in favor of the vendor. *Id.*
5. A court of equity will not specifically enforce an executory contract when it appears to be unfair, tainted with fraud or induced by misrepresentation. *Id.* 659.

STAY OF PROCEEDINGS.

1. A stay of proceedings in a suit provided by section 6, chapter 136, Code, rests in the sound discretion of the court. To warrant the stay it must be essential to justice, and it must be that the judgment of decree by the other court will have legal operation and effect in the suit in which the stay is asked, and settle the matter of controversy. *Dunfee* v. *Childs*, 225.

STRIKING OUT EVIDENCE. See *Trial*, 2.

SUITS IN EQUITY. See *Limitation of Actions*, 2.

SWORN STATEMENT OF ACCUSED. See *Criminal Law*, 9.

SYLLABI APPROVED.

1. Syllabus point 4, *Dix* v. *Robinson*, 18 W. Va. 528, and point 1 syllabus, *Maxwell* v. *Burbridge*, 44 W. Va. 248, approved. *Loverin & Browne Co.* v. *Bumgarner*, 47.

TAXES.

1. A purchaser in possession of land under an executory contract of sale is liable as between himself and the vendor for all taxes assessed on the land after the commencement of his possession, in the absence of a stipulation to the contrary. *Spies* v. *Butts*, 385.

TAX DEED. See *Taxation*, 2.

TAX SALE. See *Taxation*, 1, 6.

TAXATION.

1. The syllabus in *State* v. *McEldowney, et al.*, 55 W. Va. 1, (47 S. E. 653, approved. *Day* v. *Fay*, 65.

TAXATION—*Continued.*

2. A case where the evidence is sufficient to establish the allegation of the bill. *Id.*
3. In a suit by the State to sell land as forfeited in the name of a certain owner, if another adverse claimant resists redemption asked by the owner of the forfeited land, on the ground that it is within his land, held under an older grant from the State, the burden of proof rests on such contestant of redemption to prove that the land of the person asking redemption lies within the bounds of his land. *State* v. *Lowe*, 262.
4. Price conveys a tract of land to Higgins "except one-half the oil and gas royalty, which is one-sixteenth of all oil and gas underlying said tract of land;" Price conveys half of the sixteenth which he so excepted to Jolliff, McNeeley and Ice. Higgins is charged on the land tax book for 1901 with the tract without reduction of valuation for the interest in oil and gas reserved by Price. Price is charged on the land tax book for 1901 with one sixteenth of the oil and gas. Jolliff, McNeeley and Ice are charged on the land tax book for 1901 with one-sixteenth of the oil and gas. Higgins pays his taxes and Price pays his, but Jolliff, McNeeley and Ice fail to pay their taxes. A sale of the interest of Jolliff, McNeeley and Ice in the oil and gas for taxes will not pass good title, because of the payment of taxes by their co-tenant, Price or Higgins. *Snodgrass* v. *Jolliff*, 292.
5. Payment by a tenant in common of taxes for the common property under an assessment in his name will render a sale of his co-tenant's interest for taxes in his name for the same year void. *Id.*
6. Where the validity of a sale of land for delinquent taxes is attacked by proper suit in equity to set the sale aside, before deed to the purchaser is made and recorded, for material irregularities and failures to comply with material provisions of the statutes in relation to the proceedings leading up to and including the sale, and the existence of such irregularities and failures is put in issue between the plaintiff and such purchaser, a defendant, by proper pleadings in the cause, the burden is on such purchaser claiming under the tax sale to show substantial compliance with all the material provisions of the statutes in relation to the proceedings leading up to and including the sale. *Finance & Trust Co.* v. *Fierbaugh*, 334.
7. The rule above stated is not changed by the fact that a deed to such purchaser is recorded pending this suit. *Id.*
8. A sealed writing witnesses that "the lessors do demise, let and lease for coal mining and coke manufacturing purposes for a period of thirty years" * * * a tract of land; and that the lessors "do also grant unto the lessee the sole and exclusive right and privilege of mining, shipping and selling the coal from the above leased premises * * and the right to erect and use all buildings and structures necessary for the purposes of mining,

TAXATION—*Continued.*

coking and shipping the coal and coke;" and also that "it is expressly agreed between the respective parties to this lease that if at the expiration of the said period of thirty years, all the available merchantable coal which can be profitably mined, and which is hereby let to the lessee for that purpose, has not been mined and removed, then the lessee shall have the privilege of an extension of this lease upon the same terms and conditious as those hereinbefore set forth, for a reasonable additional time until the whole of said coal can be so mined and removed." The writing provided for a rent or royalty to the lessors of ten cents a ton for all coal mined, and also contained a clause of forfeiture for noncompliance by the lessee with the covenant of the writing. *Held*, that this writing created a lease, a chattel real, taxable to the lessee under chapter 35, Acts of 1905. *Coal & Coke Co.* v. *Tax Com'r.* 601.

9. Chapter 35, Acts of 1905, in its taxation of chattels real, is not in violation, as double taxation or otherwise, of the State Constitution. *Id.*

See *Constitutional Law*, 1.

TENNANCY IN COMMON.

1. The payment of taxes by one co-tenant, on the land owned in com mon, does not itself, constitute an ouster of another co-tenant *Clark* v. *Beard*, 669.
2. The statute of limitations does not begin to run in favor of one co-tenant of land in possession, against another co-tenant thereof, until actual ouster by the former, or some other act or acts on his part amounting to a total denial of the right of the latter, and until notice or knowledge of the act or acts relied on as an ouster is brought home to him. *Id.*
3. The notice or knowledge required must be either actual, or the act or acts relied on as an ouster must be of such an open and notorious character as to be notice of themselves, or reasonably sufficient to put the disseized co-tenant on inquiry which, if diligently pursued, will lead to notice or knowledge in fact. *Id.*

TIME OF PAYMENT. See *Guaranty*, 2.

TITLE TO MAINTAIN. See *Ejectment*, 5.

THREATS. See *Homicide*, 1, 2.

TRIAL.

1. An offer of evidence, not appearing in any way to be relevant and material, is properly rejected. *Lewis, Hubbard & Co.* v. *Supply Co.* 77.
2. A motion to exclude all the plaintiff's evidence introduced upon the trial of an action should be sustained, when such evidence is

TRIAL—*Continued.*

insufficient to sustain a verdict in favor of the plaintiff, notwithstanding there is a scintilla of evidence supporting the plaintiff's case. *Dye* v. *Corbin*, 266.

3. When a case depends on the weight of evidence and deductions from it, and conflicting evidence and credit of witnesses, the court should not instruct a verdict. *Kenneweg Co.* v. *Miley*, 360.
4. Upon the consideration of a motion to exclude all the plaintiff's evidence introduced upon the trial of an action, he is entitled to the benefit of all proper evidence so introduced, and to all legitimate inferences of fact which may be drawn therefrom. *Hanley, Admr.* v. *Railway Co.*, 420.

TRUSTS.

1. One taking a deed for land knowing that another has a valid equitable title to the same land from the same vendor is held in equity as holding the legal title in trust for the benefit of the first purchaser, and equity will compel him to pass the legal title to such first purchaser. *Reel* v. *Reel*, 106.
2. Where land is purchased and paid for by one who takes a title bond therefor and who dies before obtaining a deed, leaving surviving him a widow and children, and the widow, on account of such purchase, procures the vendor of her husband to convey the land to her, she will be treated in equity as a trustee, holding the legal title for the heirs, the equitable title thereto having immediately upon the death of the father, vested in them, subject to the widow's dower. *Gentry* v. *Poteet*, 408.
3. A verbal statement of one holding the equitable title to land to the effect that he wants the same conveyed to his wife will not operate to pass the equitable title to her, and where, after the death of the husband, his vendor, on account of such statement, conveys the land to the widow, such deed does not thereby vest the equitable title to said land in the widow, but it will operate only to convey the legal title, to be held by her in trust for the heirs, which a court of equity will enforce upon proper bill filed for that purpose. *Id.*

UNDUE INFLUENCE. See *Cancellation of Instruments*, 3; *Deeds*, 1.

UNLAWFUL DETAINER.

1. For evidential purposes in an action of unlawful entry and detainer between the owner, or a claimant under color of title, of a large tract of land and another person, possession of a small portion of such tract by a tenant of such owner or claimant, under a lease restricting the right of occupancy and use of the land by the tenant to such small portion, is, in legal effect, possession by the owner or claimant of so much of the entire tract as is not in the actual hostile possession of some other person. *Camden* v. *Lumber Co.*, 149.
2. In an action of unlawful entry and detainer, it is not reversible er-

UNLAWFUL DETAINER—*Continued.*
for to refuse to allow the introduction, by the defendant, of a deed or contract showing he does not own, and is not in possession of a portion of the land sued for. *Id.*

USURY.
1. The defense of usury is personal to the debtor. *Chenoweth* v. *Building Ass'n.* 656.
2. A purchaser of real estate charged with an usurious debt, who assumes to pay such debt in consideration of his purchase, cannot defend against the usury. *Id.*
See ***Building & Loan,*** 5, 6.

VALIDITY. See ***Corporations,*** 1, 2; ***Deeds.*** 9.

VALIDITY OF AGREEMENT. See ***Boundaries,*** 1.

VARIANCE. See ***Pleading and Proof,*** 1.

VENDOR AND VENDEE.
1. A vendee selling land by executory contract stipulating that he must make a deed and that the first payment of purchase money shall be made when he shall make a deed, and who delivers to the purchaser possession at the date of the contract, is entitled to interest on the whole purchase money, though the vendor be in default in making the deed, unless the purchaser set apart the purchase money for the vendor, and notify the vendor of his readiness to pay, and do not himself use the money. *Hoard* v. *Railroad Co.*, 91.
2. Where a party to a suit interested in a decree for sale of a debtor's land by having a debt decreed him against the land is the purchaser under the decree of sale, and he then conveys the land, after confirmation of the sale and before a bill of review or appeal to reverse the decree of sale, to a *bona fide* purchaser for valuable consideration without notice actual of error in the decree, such purchaser's title is not affected by a reversal of the decree of sale on bill of review or appeal. *Dunfee* v. *Childs*, 226.
3. One claiming land under either a quit-claim deed or a deed with covenant of special warranty may make the defense of a purchaser for valuable consideratiou without notice. *Id.*

VERDICT. See ***Appeal,*** 13; ***Ejectment,*** 7.

WAIVER OF BREACH. See ***Insurance,*** 5, 6.

WILLS.
1. H. K. made his will devising his real estate share and share alike to his seven children and relative to his devise to one of them, who had one child living at the date of the will as well as the date of

WILLS—*Continued.*

the testator's death, the following provision was made: "But the share that I will and bequeath to my daughter, Emmazetta Bentley, late Emmazetta Knight, it is my express will and desire and I hereby give the same to her and her child or children, to be held by them free from the claim or claims of control of her husband, and the same shall be held and enjoyed—the said Emmazetta Bentley and her child or children, as her or their separate estate, and that the said Bentley shall not have or exercise any control over the same directly or indirectly, in any manner whatever." *Held:* That not only the child living at the date of the will and at the time of testator's death, but all children born to E. thereafter, took each in fee equally under the will with E. the mother. *Bentley* v. *Ash*, 641.

WRIT OF ERROR.

1. When upon the hearing of a case in the appellate court one of the parties tenders and asks to file in the case as a part of the record thereof a paper purporting to be the original bill of exceptions taken in the case on the trial, and it is admitted in open court by the opposing party that it is the paper it purports to be, the court will consider it as a part of the record, in the same manner as if brought up on *certiorari*. *Schwarzchild*, v *R. R. Co.*, 649.
2. Upon a motion in the appellate court to dismiss a writ of error as improvidently awarded upon the ground that "there is, and was, no legal bill of exceptions signed and sealed by the trial judge in said cause," the writ of error will not be dismissed for such reason, where the bill of exceptions as it appears in the record as certified is sufficient on its face. *Id.*

WITHDRAWAL OF BORROWING MEMBER. See *Building & Loan*, 3.

WITNESS.

1. An agent contracting in behalf of his principal with a person since deceased is a competent witness in behalf of his principal against the estate of the deceased party to prove the transaction. *Brown* v. *Click*, 172.
2. Where a witness in trial of a case makes statements in material matters touching the issue inconsistent with former statements made by him concerning the same matters, the party against whom such witness testifies is entitled to have the jury instructed that if they believe from the evidence in the case that the witness made inconsistent and contrary statements concerning such matters, then the jury has the right to disregard the whole testimony of such witness, or give it such weight as to which they think it is entitled. *State* v. *Trail*, 175.

WITNESS—*Continued.*

3. The testimony of a witness, upon the preliminary examination of one accused of crime, may be used by the witness upon the trial of such accused person for the purpose of refreshing his present recollection, but when so used it is not admissible in evidence and should not be read to the witness in the presence of the jury. *State* v. *Sarah Ann Legg*, 315.

WITNESS OUT OF STATE. See *Depositions*, 2.

WRIT OF POSSESSION. See *Intoxication*, 1.

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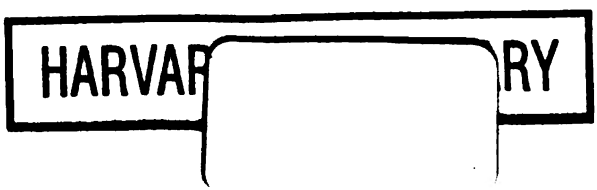
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